

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6049

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6049

SECRETARY OF THE INTERIOR, *et al.*,
Appellants,

—v.—

COUNTY OF SUFFOLK, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE
NATURAL RESOURCES DEFENSE COUNCIL, INC.

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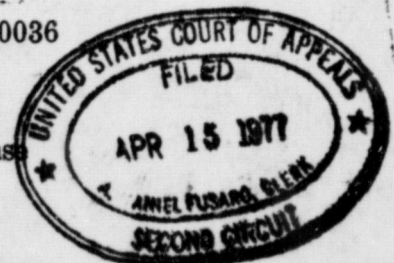


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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-6049
77-6050

COUNTY OF SUFFOLK, COUNTY OF NASSAU, TOWN OF ISLIP,
TOWN OF HEMPSTEAD, TOWN OF NORTH HEMPSTEAD, TOWN
OF OYSTER BAY, TOWN OF HUNTINGTON, and the BOARD
OF TRUSTEES OF THE TOWN OF HUNTINGTON AND
CONCERNED CITIZENS OF MONTAUK, INC.,

Appellees,

-against-

SECRETARY OF THE INTERIOR, et al.,

Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,
and NEW YORK GAS GROUP,

Intervenor-Appellants.

THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Appellees,

- against-

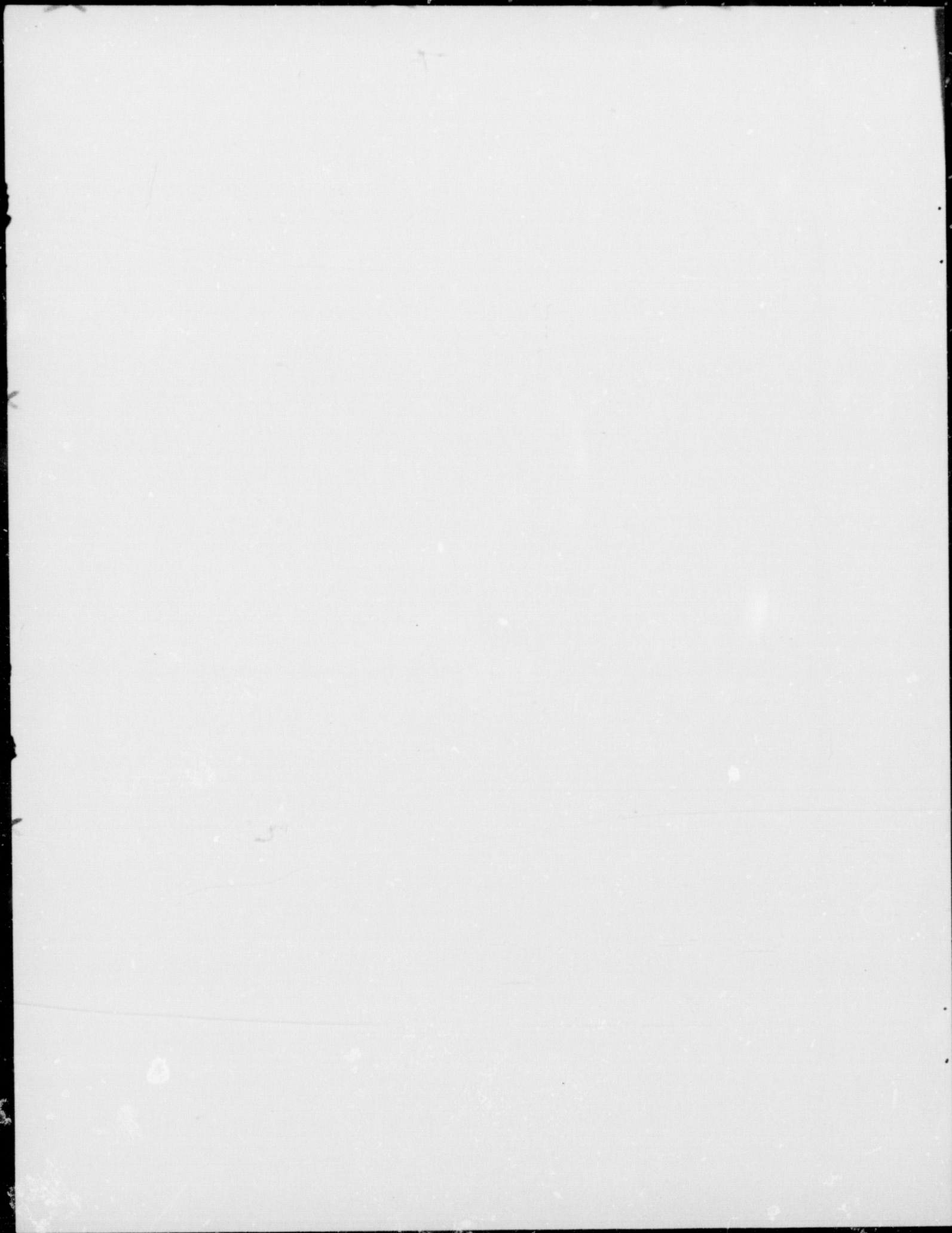
THOMAS S. KLEPPE, Secretary of the Interior,

Appellant,

NATIONAL OCEAN INDUSTRIES ASSOCIATION, et al.,

Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



BRIEF OF APPELLEE
NATURAL RESOURCES DEFENSE COUNCIL, INC.

Preliminary Statement

On February 17, 1977 the United States District Court for the Eastern District of New York, Judge Jack B. Weinstein, entered judgment against the Secretary of Interior and the intervening defendants, holding that the Secretary of Interior had violated the National Environmental Policy Act (NEPA) (42 USC §§4321 et seq.) in five distinct, significant ways, each of which was sufficient to merit the granting of relief by the Court. The District Court thereupon declared null and void all the leases to explore for and develop oil and gas in the Outer Continental Shelf (OCS) in the Mid-Atlantic region off the East Coast of the United States (Sale No. 40) and enjoined defendants from "further proceeding with the exercise of any powers purportedly granted by Sale 40 leases" The District Court stayed its opinion, pending appeal.

Appellants are here appealing from the aforesaid decision and order, over which this Court has jurisdiction pursuant to 28 USC §1292(a)(1).

QUESTIONS PRESENTED

1) Was the District Court correct in finding that the Secretary violated NEPA in that he failed to consider the practical effects of local governmental licensing, permitting and review powers in the NEPA documents?

2) Was the District Court correct in finding that the Secretary violated NEPA in that he failed to consider the environmental impact of specific probable pipeline routes from the outer continental shelf, in spite of the fact that projection of such routes is routinely made by industry and could have been made by the Secretary or his agents?

3) Was the District Court correct in finding that the Secretary violated NEPA in that he greatly overstated peak oil and gas production for Sale 40 and significantly understated the cost of such production, including pipeline construction, which resulted in a serious lack of consideration of the likelihood and attendant dangers of increased tanker traffic and an overestimate of the net value of the entire project?

4) Was the District Court correct in finding that the Secretary violated NEPA in that he failed to consider the possible impact of particular tract-selection choices on the feasibility and sites of pipelines and, as a result, failed to consider the alternatives of either excluding industry-preferred tracts or including less highly-desired tracts in the final sale offer because of related onshore impacts and developments?

5) Was the District Court correct in finding that the Secretary violated NEPA in that he failed to consider the alternative of separating exploration from production leasing?

6) Was the District Court correct in granting the injunction and voiding the leases?

STATEMENT OF THE CASE

This case concerns the protection and preservation of the environment, not the prevention of oil and gas drilling and development on the Outer Continental Shelf (OCS).

The National Environmental Policy Act (NEPA) provides that a detailed statement by the responsible federal official must be included by all federal agencies in every proposal for major federal action significantly affecting the quality of the human environment. (42 USC §4321 et seq.) Compliance with this procedure is required of every federal agency to the "fullest extent possible," as the only way in which the public can be assured that the proposing federal agency gives serious weight to environmental factors in making discretionary choices and that the Environmental Impact Statement (EIS) is more than a mere token effort.

The Court below found that the Secretary of Interior failed to meet his responsibilities under NEPA because the environmental impact statement he prepared and considered for the first leasing of oil and gas in the Atlantic was seriously and substantially inadequate. The effect of the District Court's judgment is to ensure that the Secretary's decision to proceed with leasing of exploration and production rights is done in full compliance with the law. This is the only way to ensure that drilling and production activity are done correctly and with the proper environmental safeguards.

NEPA requires that analysis of environmental factors comes at a meaningful stage in the federal agency's decision process, not so late that the analysis becomes a mere meaningless exercise. That meaningful stage is now, because, by his leasing decisions, the Secretary is determining the basic pattern of OCS oil and gas exploration, development and production in the Mid-Atlantic (Sale 40) region, for the next twenty to thirty years (the projected life of the oil and gas reserves), and, as well, the environmental consequences flowing therefrom.

The permanent, pattern setting decisions made by the Secretary include: the choice of areas of federal land to lease; the setting of lease terms, which may not subsequently be changed; the granting to lessees of the rights to explore, develop and produce. This last aspect of the Secretary's leasing decision in the Mid-Atlantic means that the lessees obtain vested rights to renew their leases for as long as oil and gas "may be produced in paying quantities" (43 USC §1337b). While some adjustments in the pattern may subsequently be wrought through the exercise of federal monitoring and regulatory control, the basic rules are locked in at the time of leasing. Therefore, compliance with NEPA at this juncture is critical. If the rules and patterns are set without such compliance, subsequent attempts to deal with fragmented parts of the program will be window dressing.

The consequences of the relief that the District Court granted are not radical. The federal government must simply go back and do the necessary environmental analyses correctly, now, and then proceed expeditiously to allow drilling under such conditions as those analyses dictate. The Court below granted the relief because it was convinced by the evidence that the goals of environmental protection and the need for rapid exploration of the OCS must and can be reconciled, and that the Department of Interior failed in its responsibility to do this by its material and fundamental violations of NEPA. The preliminary injunction hearing

These actions were brought separately by plaintiffs to enjoin the Secretary of the Interior from pursuing his goal of holding the first oil and gas lease sale in the Atlantic Ocean (Sale 40) on the grounds that the Secretary had failed to comply with the mandates of NEPA, the Outer Continental Shelf Lands Act, and other relevant statutes. The two actions were consolidated for purposes of a hearing on an application for a preliminary injunction. The hearing took place over eleven days in late July and early August, 1976. On August 13, 1976, the District Court held that defendant Secretary of the Interior had violated the mandates of the National Environmental Policy Act because the Sale 40 Environmental Impact Statement (Sale 40 EIS) failed to detail or consider the impact that the existence and use of state and local land use controls could have on the

leasing program.

The Court held:

"These controls on land development along the coast will mean that much of the onshore activity that will accompany OCS exploratory drilling and production will be regulated and subject to approval by the states. Without more coordination between the states and the federal government it is impossible to predict with accuracy the impact OCS development will have on the seashore. Certainly the information the Secretary had at the time of his decision to proceed with Sale No. 40 did not permit a sound judgment as to what the five states affected by the sale would sanction.

* * *

Without analysis of these state provisions and of the probable extent of state cooperation or opposition a realistic appraisal of the impact of Sale No. 40 is not possible. No meaningful discussion of this vital dimension of the environmental problem is contained in the final EIS OCS No. 40 or the PDOD. Cf. Final EIS OCS Sale No. 40, Vol. 1, pp. 42-49, 58-61, Vol. III, p. 154. This failure, even though it did not constitute a violation of the [Coastal Zone] Management Act, did violate NEPA." (Order 65-6: JA 220-1.)

Accordingly, the District Court granted a preliminary injunction, enjoining the Secretary from holding oil and gas Lease Sale No. 40.

Defendants applied at once to this Court, on August 16, 1976, for a stay of the District Court's order.

The prior appeals

At the initial appeal to this Court on the issue of the stay of the preliminary injunction, this Court granted a stay, on the limited grounds that the "...sale, in and of itself" would not cause irreparable injury. During oral argument, this Court had noted that it saw no reason why it could not vacate the

leases at a subsequent date if a NEPA violation was shown. Plaintiffs thereupon applied to Mr. Justice Thurgood Marshall for an order to vacate this Court's stay. Mr. Justice Marshall took cognizance of the Court's narrow ruling in his written order of April 19, 1976 which refused to vacate the ~~stay~~. Mr. Justice Marshall's written order stated:

"The Court of Appeals concluded that plaintiffs would not be irreparably injured if the Secretary were permitted to open the bids. I cannot say that the court abused its discretion. It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an 'irreversible commitment of resources,' Natural Resources Defense Council v. NRC, Nos. 75-4276, 75-4278, slip op. at 3934 (CA 2, May 26, 1976), a citizen's right to have environmental factors taken into account by the decision-maker would be irreparably impaired. (Footnote omitted.)

"For this reason, the lower courts repeatedly have enjoined the Government from making such resource commitments without first preparing adequate impact statements."

* * *

"In the instant case, however, the Court of Appeals apparently decided that the opening of bids does not constitute an 'irreversible commitment of resources.' I am unprepared to say that the court was wrong in so holding. In the first instance, it is quite clear that the actual opening of the bids does not involve a commitment of any kind, since the Secretary reserves the right to reject all bids. Thus it is not until a bid is accepted -- which may not happen for 30 days -- that an irreversible commitment is even arguably made. Moreover, even after the bids are accepted, I cannot say that the Court of Appeals would be without power to declare the leases invalid if the court determined that the Government entered into leases without compliance with the requirements of NEPA." (Footnote omitted.) 97 S. Ct. 4(1976)

Following its stay of the injunction, this Court on October 14, 1976 reversed Judge Weinstein's order granting the preliminary injunction. This Court affirmed its earlier ruling on irreparable injury, and stated that a review of the Programmatic EIS (PEIS) and the Sale 40 EIS created "some doubt as to the probabilities of plaintiffs' success on the merits." (9 ERC 1794, 1795)

Plaintiffs thereupon returned to the District Court for trial.

The plenary trial

At the pre-trial conference, the District Court ruled that plaintiffs could present additional evidence, beyond that presented at the preliminary hearing, properly recognizing that the constraints applicable to the motion for preliminary relief had not given plaintiffs the full opportunity to present their evidence.

At the trial, plaintiffs submitted evidence from several witnesses covering the issues they believed had been improperly detailed or considered by the former Secretary of the Interior. Plaintiffs were successful in persuading Judge Weinstein on only some of the issues.*

*Judge Weinstein was scrupulously careful and selective among the issues. His opinion reflected only those issues on which convincing testimony was adduced. For example, he did not accept plaintiffs evidence or arguments, strenuously urged, that the Sale 40 EIS failed to confront cumulative impacts adequately, nor did he accept the arguments and proof on alternative energy sources to Sale 40.

There was dramatic, new evidence, presented at the trial which convinced the District Court that there had been NEPA violations in addition to the one he had found in his preliminary injunction order. It is significant that what was "critical" (T.Tr.868) to Judge Weinstein on the important issue of pipelines was the testimony of one of the oil industry's own witnesses, who demonstrated that the government's position on this subject was not valid.*

We turn now to the opinion of the District Court.

The final judgment of the Court below

Having recognized from the evidence at the trial that the inadequacy of the Sale 40 EIS was much more extensive than he had originally believed, Judge Weinstein did two things: he re-examined his original holding in light of this Court's comment that the "numerous references" in the Sale 40 EIS to "the possible lack of state cooperation" cast "some doubt" on plaintiffs' ability to succeed on the merits (9 ERC 1794, 1795) and he analyzed the evidence with respect to other NEPA violations alleged by plaintiffs.

As a result, the District Court issued a meticulous opinion focusing on five major violations of NEPA that he

*Defendants try to tie the District Court to the limits of its initial order, failing to recognize that a record was developed at the trial which established other NEPA violations that the Court was compelled to take cognizance of and determine.

determined had taken place. The District Court found:

1. The Sale 40 EIS was inadequate in its treatment of the powers of state and local government, and the effect of the exercise of these powers on the OCS program. The "numerous references" were merely a "listing in abstract form"

(Dec. 15, J.A. 37) of such powers, which "read like a theoretical college thesis," (Dec. 19, J.A. 41) and was "without the hard empirical data needed by any practical person making a decision" (Dec. 19, J.A. 41). The Court found that the "empirical data" was available to the Secretary prior to the sale 40 EIS, and that the local communities had been vocal in expressing their intent to use their powers. The decision sharply criticized the Sale 40 EIS, because it "studiously avoids the factors required for rational, practical decision making." (Dec. 19, J.A. 41). The District Court carefully explained and then reaffirmed its initial finding that the Sale 40 EIS was inadequate in dealing with the issue of state and local impacts on the program, and that the issue was inadequately considered by the Secretary.

2. The Secretary could have, yet wholly failed to detail and consider probable pipeline routes. There were three reasons to identify likely routes as specifically as existing information available to the Secretary would permit. These were (a) to determine their acceptability under existing state and local controls, (b) to determine their environmental impacts,

and (c) to determine their economic feasibility, particularly as compared to tankers. The Court found that "...deferral of an attempt to grapple with specifics borders on irresponsibility..." (Dec. 26, 27 J.A.48-49) especially because it was apparent from testimony that the Court considered "critical" (T.Tr. 868.) that oil companies can and do "grapple with specifics" of this kind as a matter of common practice, before they bid for leases. The Court below found that although the Secretary had the necessary information available to him, he and his agents were not "...as conscientious as Shell Oil in exploring specific pipeline locations from an environmental perspective,..." (Dec. 34, J.A. 56). The District Court therefore held that the Secretary violated NEPA in not undertaking a "meaningful analysis" of pipeline corridors (Dec. 43, J.A. 65).

3. Secretary underestimated finding costs of hydrocarbons, had underestimated pipeline construction costs, had underestimated the total investment required to find and produce the oil, and had overestimated the ability to reach the projected peak levels of production. The Court concluded that there were "Gross Mises- estimates of Costs and Benefits" (Dec. 57, J.A. 79) and that therefore, "there would be no adequate balancing of economic benefits against environmental costs." The Court found that, "It should be emphasized that the discrepancies are so substantial that they cannot be attributed to mere differences in judgment. They were so inadequate as to constitute, for NEPA

purposes, a failure to make a meaningful inquiry. As a result, the Secretary's decision on Sale 40 was in this respect arbitrary and capricious and in violation of NEPA." (Dec 58, J.A. 80) (Emphasis supplied).

4. The Secretary failed adequately to consider at least one significant alternative to the Sale 40 leasing procedure - the alternative of separating exploration from production leasing. The Court found that many groups had requested consideration of this alternative, (Dec. 59, 60 J.A. 82,83) and that the government failed to consider the alternative in the Sale 40 EIS.

The evidence showed that separation would "allow government at all levels to exercise timely and essential controls over environmental, social and economic impacts, especially those associated with onshore development" (Dec. 60, J.A. 83) and that by the government's insisting on tying development and production rights to these leases, the ability to exercise these controls is largely lost. After discussing the fact that reasonable alternatives may not be "cursorily dismissed" (Dec. 65, J.A. 88), the Court held that "the agency's decision to hold Sale 40 was not based on a good faith consideration of this alternative." (J.A. 94).

5. Lastly, the Court found that what was indeed admitted by the government's witness - that the government "neglected to examine the potential environmental effect of offering, and accepting bids on, tracts other than those actually proposed and leased."

(Dec. 71, J.A. 94.) Had this not been so ignored, the "alternatives of either excluding industry-preferred tracts, or including less highly desired tracts...because of related onshore impacts and developments" might have been considered. (Dec. 7,8, J.A. 29,30.)

Having found the extensive NEPA violations, the Court then discussed, without deciding, the very strong evidence that put the whole matter of the Secretary's good faith in considering environmental factors in the decision-making process into question. The Court then decided that, the NEPA violations being extensive, and each of them being sufficient to merit the remedy, the relief of voiding the leases and enjoining any further proceedings was appropriate.

THE RELEVANT FACT UPON WHICH THE DISTRICT COURT
BASED ITS DECISION THAT NEPA WAS VIOLATED

There was ample factual evidence produced at both the plenary trial and the preliminary hearing upon which the District Court could and did base its decision.

The evidence on each of the matters where NEPA violations were found invariably showed that facts existed, and were available to the Secretary or his agents during the preparation of the Sale 40 EIS, which would have allowed the adequate detailing and consideration of those environmental impacts and alternatives that were ignored or insufficiently considered. The evidence also showed that consideration of these matters had been sought

by plaintiff and others during preparation of the EIS, but it had not been undertaken.

A. Facts relating to the network of state and local controls.

At the trial, some fourteen witnesses (three by stipulation entered in the Courtroom) testified about the framework of laws which could be used to prohibit or restrict onshore facilities, including pipelines, and the impacts their exercise could have on the leasing program. Seven of NRDC's witnesses were public officials within the State of New Jersey, where these impacts will fall most heavily, and where pipelines are most likely to come (Dec. Appendix D; J.A. 154).

The witnesses demonstrated that a solid phalanx of restrictive community zoning ordinances requiring variances for pipelines and other oil-related facilities and county planning restrictions already exists along New Jersey's entire Atlantic coast from Sandy Hook to Cape May, in addition to a second tier of controls through the state's Wetlands Act, Riparian Lands Act and Coastal Areas Facilities Review Act (CAFRA). They showed that both the state level and the local levels of government have a veto power over the siting of energy facilities. (J.A. 1225.)

Using an aerial photograph of his County (Exhibit T-214) Mr. Jarmer testified that there was no place within the whole Cape May County beachfront where a pipeline could come across without interfering with either beach use and or valuable tidal wetlands (J.A. 1216). Mr. Jarmer further testified that all of the sixteen municipalities in Cape May County have zoning ordinances,

and none of them permits construction of oil-related facilities, including pipelines, without a variance.

Mr. Jarmer further explained that two-thirds of Cape May County is under the ten-foot contour and subject to flooding and drainage problems, thus posing serious impediments to effective oil spill clean-up resulting from pipeline rupture or leaks (J.A.1213).

Fred Coldren, Cape May City Councilman, and Guy Muziani, Mayor of the City of Wildwood, testified that the economic base of each of their cities is tourism, which provides some ten to twelve thousand jobs; that the base is built by local capital being reinvested; that their beaches are beautiful and heavily utilized; that an oil spill would have a devastating effect on their communities, creating irreplaceable losses and irreparable damages; and that some communities have already acted to protect themselves by prohibiting pipelines absolutely. (J.A.1267-91.)

Tom Thomas, Director of the Ocean County Planning Board, presented testimony substantially similar to the representatives of Cape May County. He testified that there are no areas in Ocean County where there is unrestricted access to the water where industrial development may go without a zoning variance. (T.Tr. 197.) He testified that there was a great deal of opposition to heavy industrial use within the county (T.Tr. 198), and that the coastal communities have the power to prohibit pipelines and other oil-related facilities. Mr. Thomas testified that the impact of an oil spill on Ocean County would be devastating and that the damage could be several millions of dollars to the fishing industry

alone. (J.A.1322).*

Then, Mr. Corman of the New Jersey Public Advocate's Office, showed that legislation may be necessary to create authority to allow pipelines to cross the outer fourteen thousand feet of New Jersey's submerged lands between the three-mile limit and the "commissioner's line" one thousand feet offshore, and that the prospects of passage of such legislation in New Jersey is speculative, at best. (J.A.1456-61.)

The witnesses for the County of Suffolk testified that Nassau and Suffolk Counties in New York also have strict regulations and ordinances that prohibit pipelines without variances from coming across the beaches. Even Deputy Mayor Elliot testified that New York City has legal restrictions that would prohibit pipelines from coming ashore anywhere along the south coast of the city (which is almost all city beach and park lands, except for those owned by the United States as part of Gateway Park) without the approval of the Board of Estimate, on which the Mayor had only four of twenty-two votes. (J.A.1758.) Another of NOIA's witnesses, Franklin Brunjes, testified that every pipeline route considered by Shell for oil transportation would require approvals by local, state, and federal authorities. (J.A.1767.)

There was extensive, indeed, overwhelming testimony showing

* NRDC offered three other elected officials as witnesses. It was stipulated that their testimony would have been substantially the same on direct and cross-examination as that of the other officials. These witnesses were Mayor George Tompkins of Seaside Heights, Mayor James Mancini of the Township of Long Beach, and Elected Freeholder Leonard Connors, all of Ocean County.

the facts that create the hostility the local government and state officials have to pipelines and the onshore facilities that trail in their wake.

At the initial hearing, Professor Mitchell of Rutgers University, testified that pipelines and their rights-of-way can damage wetlands, beaches, the Pine Barrens of New Jersey, and other fragile areas, and that their construction through crowded urban areas could cause serious disruption. (J.A.508-11.) He also demonstrated that where pipelines go, numerous downstream facilities such as gas-processing plants and petrochemical plants (all highly polluting to the air and water) soon follow. (J.A.516-34.) This was confirmed by the information provided in Factbook on pipelines (J.A.2833-46) and downstream facilities (J.A.2858-2930), and by the discussion of oil and gas development in the Report of the Senate Committee on Commerce, on S.586 (Sen. Report No. 94-277, 94th Cong., 1st Sess. 1975) (Court Exhibit 4 at Preliminary Hearing), which reported (at p. 11) that between 1938 and 1971, ~~there were~~ "over 100 major petroleum and petrochemical plants placed in coastal parishes" in Louisiana. Professor Mitchell also testified that the Scottish experience with oil discoveries off the coast led to an overwhelming of the planning process and the inability of the local governments to cope with new developments in their areas. (J.A.462-66.) This severe problem at the local level was confirmed in the Senate Report, supra (at p. 16), and more graphically described, on another occasion, by NOIA's witness, Mr. Bybee, as

a "rape of the land." (J.A.2264 , Senate Report, supra, p. 10.) The fact that pipeline-related facilities crowd to the coast and cause extensive damages was admitted by NOIA's witness, Mr. Smalley, on cross-examination, when he testified that in Louisiana alone, it has led in the past twenty-five years to the loss of three hundred square miles of coastline, an average of one square mile across its entire east. (JA 1029-30 .) This information was also confirmed in the Senate Report, supra, p. 10. Dr. Oppenheimer, another of defendant NOIA's witnesses, testified that seafood in the Texas Gulf area all have a petroleum taste, (JA 1007), which surely had to be of concern to the oystermen of Cape May and Gloucester Counties, and the clamdiggers of the whole New Jersey and New York coastal areas. Nor was there much cause for comfort to local officials in the Murphy Committee Report statement, "Pipeline accidents have released more oil to the marine environment than all sources directly related to OCS operations." (J.A. 3080.)

Professor Milgram of M.I.T. testified, without contradiction, that a million-barrel spill was possible before automatic shut-off equipment took effect. (JA 372.)

These witnesses' testimony was uniform in support of the District Court's initial finding that a "meaningful discussion" analyzing coastal communities' powers, discussing how they may use them to oppose or restrict the Secretary's Sale 40 program, and explaining the impacts of such controls upon the environment

and upon decisions that will be made about tankers and pipelines was inadequate in the Sale 40 EIS, and lacking from the Secretary's consideration when he made his decision to proceed with Sale 40.

Moreover, the evidence showed that all of these regulations, zoning controls, state laws, regulatory bodies and other organs of state and local government were in existence at the time the Sale 40 EIS was being prepared.

Cape May County's opposition to pipelines and industrial facilities was set forth publicly prior to May 1976, and was available to the Interior Department before the Sale 40 EIS was finalized. (JA 3033,3045.)

Many other governments and environmental groups were articulate in their opposition to the program, voicing their specific and general objections to the Secretary's program and the Sale 40 EIS. Ocean County, the Tri-County Offshore Committee, Monmouth County, the State of New Jersey Department of Environment, the Governor of New Jersey, the State of Maryland, the State of New York, and the Counties of Nassau and Suffolk complained about the risk of oil spills, the impacts of downstream development facilities on their areas, and the damages they feared. Several of these commentators also objected to the lack of specificity in the Draft Sale 40 EIS on pipeline routing and landfalls (3 EIS pp. 30, 251), an omission which went unremedied in the final Sale 40 EIS. These comments clearly signalled the potential

opposition to Interior's program as it had structured it.

The State of Maryland summed the issue up neatly, at 3 EIS 295, stating:

"If the EIS suffers from a single pervasive failing, it is that shallow lip service has been paid to concerns felt deeply by coastal communities."

In its decision, the Court below evaluated this testimony and the complete evidence documenting that these communities had been pointing out the issue to the Secretary (as witnesses the Court's quotation of Governor Byrne, JA 33-34), but had been ignored. The District Court reexamined the "numerous references" to state and local powers in the EIS to which this Court had made earlier reference. Based upon this evaluation, the District Court made several significant findings:

1. "Evidence, which could have been brought to the Secretary's attention by the NEPA documents, demonstrates that these local governmental powers can and will be utilized to prevent landing of outer continental shelf oil over wide portions of the coast line, whether that landing is by tanker or pipeline. Failure to include an evaluation of such local opposition to pipelines or tanker-related onshore facilities necessarily resulted in a failure to gain a full and meaningful perspective on the intrinsic environmental problems related to offshore oil and gas exploration." (Dec. 14; JA 36.)
2. The "most significant passages" of the "references" are only a "listing in abstract form" of the state-local powers (Dec. 15, JA 37), which "unspecific knowledge" the Court assumed the Secretary had (Dec. 18, JA 40).
3. The Sale 40 EIS is "site specific" (Dec. 23, JA 45),

and the purpose of site-specific statement requires a discussion of the actual effects of a project on a specific area. (Dec. 24, JA 46.)

4. The Sale 40 NEPA document did not fulfill that function. (Dec. 24, JA 46.)

B. Facts showing the failure to consider onshore routes and impacts of pipelines.

There was "critical" evidence (T.Tr. 868) that specific pipeline routes could be selected and analyzed for economic feasibility, for their environmental effect, and to determine if there would be opposition to them. Defendant NOIA's witness, Mr. Brunjes, showed, directly contrary to the patently untrue claim of the government that any such specification could not be done, that Shell Oil did indeed do just that, and relied on those analyses in bidding almost \$100,000,000 for leases. (JA 1827.) Mr. Brunjes produced a large chart and graph (JA 154,155), which showed that in calculating what Shell should bid for various tracts, three alternative routes were assayed -- Route 1A, a pipeline route coming through Cape May and going to the Philadelphia area refineries through New Jersey; Route 2, a pipeline route coming through Cape May County or Cumberland County on the west and going north to the Philadelphia area refineries through New Jersey; and Route 5, a tanker route to the Philadelphia area refineries.

Mr. Brunjes testified that he had been able to analyze some likely land use control areas, and pointed out one area where likely opposition from oyster harvesters on one side and the Atlantic communities in Cape May on the other guided the selection

of the landfall of one of his routes. (JA 1788-89 .)

For purposes of this case, what is significant about Mr. Brunjes' testimony is that he demonstrated that alternative pipeline routes could indeed be specified with a useful measure of reliability. Local planning officials thought so, too, for they had asked for this planning information in their comments on the Sale 40 EIS (3 Sale 40 EIS, 30). Moreover, Professor Mitchell had carefully discussed, in unrefuted testimony, that problems of rights-of-way acquisition may be enormous (JA 508-509), and pipeline laying in urban concentration is severely disruptive (JA 509).

No evidence was adduced that abandoned railroad rights-of-way either exist or are available, and Dr. Wenstrom, defendants' witness, was obliged to admit that his calculation of needed area for pipelines was somewhat higher than Dr. Mitchell's. Nor could Dr. Wenstrom suggest any shorter onshore pipeline route, and Wenstrom admitted that pipeline rights-of-way take seventy-five feet, well more than the modest fifty feet Professor Mitchell used (JA 1100).

Professor Mitchell also, in uncontradicted testimony, showed that the location of pipelines is of great significance to both the decision-maker and the people, because gas-processing plants (which pollute the air significantly), pumping stations, oil and gas-separating facilities, petrochemical plants and refineries all locate along the pipeline, often close to the shore (Factbook,

JA 2858-2930).

He further showed that honest figures as to the land usages and polluting characteristics of these facilities (JA 1181-85) were available to the Secretary when the impact statement was written.

The oil companies, plaintiffs, and all concerned local governments thus agreed on the need for and feasibility of specific analyses of likely transportation routes from OCS operations prior to the lease sale. The importance of such analyses was obvious. They identify areas for further detailed study. They make possible a meaningful analysis of potential environmental damage, of specific controls which exist, of likely opposition, and of alternatives. From Mr. Brunjes' testimony, it is clear that such analysis was within the Interior Department's capability. (JA 1724-1728.)

The government's witness, Ms. Gresham, also testified that the government possesses the same geological and geophysical information the oil companies have.

(JA 1674.)

Yet, in the Sale 40 EIS, there is virtually no discussion about where these pipelines will go.*

Quite properly, therefore, the Court found that the Secretary's

*Such discussion as is contained in the EIS is limited to vague generalities: 1. EIS Vol. 2, p. 227. No discussion of specific pipeline routes. 2. Vol. 2, pp. 281-4. No discussion of pipeline costs or specific routes. 3. Vol 2, pp. 455-457. No discussion of how exercise of state and local authority over pipeline location can affect the leasing program and the adverse environmental impacts of that program. 4. Vol. 2, pp. 289-90. General

failure to "grapple with specifics" about pipeline routes, "at least to the extent that such routes were ascertainable based on information available at the time" (Dec. 27, JA 49) was almost irresponsible, in view of NEPA's explicit mandate that all potential environmental considerations be weighed prior to the decision to proceed ... " (Dec. 27, JA 49.)

The Court drew an almost exact analogy, saying:

"It is as if the federal government decided to proceed with the construction of a major highway connecting New York and Washington -- approximately the distance to be covered by Sale 40 pipelines -- but refused to reveal the contemplated route, whether bridges or tunnels would be utilized, whether mountains would be skirted or dynamited, or the impact on the area bordering on the road. Such a course of action would surely be impermissible."

The analysis is apt. In both cases one would know, to a sufficient degree of accuracy to permit the analysis, both the origin and the destination of the routes, and the onshore terrain. What is needed first is the examination of possible alternative routes to determine their environmental impacts, the effects of

statement that state and local controls could affect pipeline routing and location of offshore facilities. No discussion of specific state and local controls which exist over pipelines and industrial facilities in areas most likely to receive pipelines nor of the stated opposition of these coastal counties or municipalities and how this could adversely affect the program. 5. Vol. 2, pp. 295 et seq. No quantification of economic impacts which might be suffered as a result of oil spill from pipeline leaks nor of how tourist-based communities might react to pipelines in view of potential oil spills.

state and local controls on the routing, and their economic feasibility, given these impacts and effects. This was not done by the Secretary, although Mr. Brunjes and Dr. Mitchell showed it could be done.

NOIA's argument about pipelines misleads the Court. None of the sections it footnotes concerning the EIS's dealing with pipelines is site-specific. They are mere generalities. There is no discussion in the Sale 40 EIS of likely pipeline routes over land, as was testified to by Dr. Mitchell.*

It was and is of critical importance to the program and to the protection of the environment that the Secretary consider the information, and it was shown that he did not, thus violating NEPA. There can be no sensible explanation for this failure, other than the Secretary simply did not wish the public to know how great the impact of pipelines and their related downstream facilities would be on their

*The discussion of pipelines in the Sale 40 EIS is one of the items where the obfuscation of the problem virtually compels a conclusion of intellectual dishonesty. Only after searching through two volumes of the Sale 40 EIS, and Technical Paper No. 1 (Exhibit 19), and some calculations, does it become apparent that not less than 240 miles (and perhaps as much as 400 miles) of pipeline are intended to be lain across New Jersey on four rights-of-way. It is clearly not readily apparent to any decision-maker nor to the people that so much onshore pipeline mileage is called for, nor does the discussion of onshore pipelines (1 Sale 40 EIS 455-7) give a clue to their possible length, width, area, impact, economic feasibility, or to the extent of possible opposition to them from coastal communities.

communities.*

C. Facts demonstrating the Secretary's analysis of the costs of the program was far too low.

Important evidence was presented by Suffolk County's witness George Donkin, who gave uncontradicted testimony that the Sale 40 EIS and the Sale 40 Program Decision Option Document ("PDOD") understated the costs associated with the proposed action and significantly overstated the anticipated production levels of oil and gas. Through his testimony and exhibit (JA 3046), Mr. Donkin made the following critical points:

1. That the estimates in the Sale 40 PDOD of the finding costs for the oil and gas reserves were unrealistically low based on recent industry data which was available to the Interior Department prior to May 1976.
(JA 1835-41, 3046-50.)
2. That the estimates for pipeline costs in the Sale 40 PDOD were \$1 million/mile, whereas data available to Interior but not used showed that a pipeline of a size similar to that anticipated for Sale 40 and laid in similar water depths cost \$1,730,299/mile.
(JA 1842-51, 3051.)
3. That the realistic finding costs and pipeline costs exceeded by 88.8-131.9%, in the low reserve case, and by 70.7-100.9%, in the high reserve case, the finding costs relied upon by the Secretary.
(JA 1851-1855, 3052-3053.)

*This is consistent with the District Court's recital of the history of the Secretary's actions leading up to the sale decision, which plaintiffs urged were a charade, masking a long predetermined decision to go ahead with the sale under all circumstances. (JA 98-104 .) While the District Court found there was substantial evidence of this charade (JA 98), it found that sufficient evidence of extensive NEPA violations rendered it unnecessary for it to so hold.

4. That the peak oil and natural gas production levels relied on by the Secretary and contained in the Sale 40 EIS and PDOD could not be obtained given the reserve estimates Interior was assuming. For example, the low reserve estimate would have to have been 52.5% greater than the Interior Department estimate to realize production levels estimated in both the Sale 40 EIS and PDOD. The high reserve estimate would have been 51% greater.

(JA 1856-1862C, 3054-3059.)

In sum, Donkin's testimony showed that the cost estimates relied on by the Secretary were inaccurate and the yearly production figures for oil and gas were seriously overstated (JA 65-66), and that the Interior Department could and should have known that, prior to May 1976.

Another significant factor which was inadequately addressed in the Sale 40 EIS and the PDOD is the economic aspect of the exercise by state and local governments of their powers to prohibit or restrict onshore facilities. These controls could lead, inter alia, to longer and more expensive pipelines or to the use of tankers. In order to assess the relative costs and benefits of the proposed action as contemplated by NEPA, the potential costs to the program resulting from the exercise of such controls should have been detailed. Mr. Brunjes' testimony clearly established the feasibility of costing out different transportation forms and routes. Such an economic assessment was thus meaningfully possible. It was also reasonably necessary in order for the Secretary to know the realistic costs of the proposed action as compared to the benefits in order for the Secretary to

fairly assess the economic feasibility of pipeline routes versus tankers. Without this information the Secretary could not make a reasoned decision as to the potential costs to be incurred by the proposed program.

The Court below recognized both these points. It gave great weight to Mr. Donkin, and accepted Mr. Brunjes' testimony as showing that the Secretary could have made, and did not make, an analysis as to relative costs of pipelines as against tankers. Mr. Brunjes testified that for the longest possible tanker route, pipelines were cheaper than tankers. He admitted that where examining shorter routes -- for example, from the lease area direct to the refineries at New York harbor when the tanker's trip would be much shorter than the pipeline -- the costs are much more comparable, and that his estimates of pipeline costs might be off by twenty-five percent (JA 1786). He further admitted that to the oil companies, when it comes to making the choice between tankers or pipelines, "economically feasible" means whichever is the cheapest way to bring the oil in. (JA 1782.) What is important about Brunjes is that the testimony showed that comparative cost studies could be made, and that the Secretary did not make them. The self-serving analyses the oil companies made, no matter what their alleged and sharply-contested result, are no substitute for one properly made by the Secretary, showing the comparable costs of tankers and pipelines to both refinery areas. With proper information, the Secretary might well have

selected other tracts. Without the proper information, then the timing, locations, size and number of pipelines, drilling wells and duration of construction may differ from the Secretary's projections, with resultant environmental and socio-economic impacts (offshore and onshore) qualitatively and quantitatively different from those estimated in the NEPA documents.

D. Facts demonstrating the Secretary failed to consider adequately the alternative of separating exploration drilling from development.

There were three prime facts to be examined concerning the alternative of separating exploration from development. First, a reading of the Sale 40 EIS shows that this alternative was not dealt with at all in Section VIII , Alternatives. Second, the flood of comments about the inadequacy of dealing with the problem that came into the Department, some of which were published in the EIS (3 Sale 40 EIS 67), demonstrated how inadequate those concerned with the separation problem thought its treatment was. These comments demonstrated the environmental benefits of such an approach. Lastly, Ms. Gresham, a government witness, admitted as much to the Court (JA 1698-1700). The facts are thus wholly clear, that the Secretary simply refused to consider this alternative seriously, as he is required to do by NEPA.

E. Facts showing the Secretary never considered the onshore impacts of alternative tracts in deciding which tracts to offer.

The evidence showed that nowhere in the Sale 40 EIS or in

any part of the Department of Interior's decision-making process was there any consideration of the effects that selection of different tracts would have on pipeline routes, onshore effects, or local land use powers.

The District Court, in its opinion, sets forth the testimony of Ms. Gresham (Dec. 73-74) which makes amply clear no such considerations entered into deciding which tracts to lease. It is also clear from looking at Ms. Gresham's map (Dec. 131) that alternative tracts, such as those further north, closer to the northern New Jersey refineries, could have been selected, which might well alter the environmental impacts, because it may be easier to bring the oil in by pipeline across Northern New Jersey, as was pointed out to the Secretary. The evidence clearly shows that a study of alternative tracts just was not done.

THE RELEVANT FACTS UPON WHICH THE DISTRICT
COURT BASED ITS DECISION TO VOID THE LEASES
AND ENJOIN FURTHER ACTIVITY IN THE SALE 40 AREA

In addition to sufficient facts upon which the District Court found serious and substantial violations of NEPA, there was evidence adduced upon which it based its decision to void the leases and enjoin further OCS activity.

Most significant of these is the fact that an irretrievable and irreversible commitment of resources takes place at the time the leases are executed. This commitment consists of the establishment of the basic pattern by which OCS resources will be

developed, and the determination of the impacts flowing therefrom, including areas of federal lands to be leased, the lease terms which govern how the development occurs, the linking of production to exploration in the leases, and the establishment of regulations which govern the lessees' activities, violation of which entitle the Secretary to cancel. Since the EIS was insufficient with respect to the impacts of these irreversible commitments and decisions, the leasing decision could not be sustained, and the leases properly declared null and void.

Furthermore, the evidence clearly established that the commitment of resources for leasing "poses a substantial threat of irreparable injury to the Mid-Atlantic region, its human and natural resources, for at least the next quarter century."

(Dec. 93, JA 116.) The evidence showed the likelihood of extensive environmental harm to the coastal environment, including wetlands, beaches and communities, resulting from OCS exploration, development, and production and their associated onshore facilities. (JA 1213, 1267-1291, 1322.)

The CEQ Report states:

"Outer continental shelf oil and gas production will result in onshore development of huge refineries, petrochemical complexes, gas processing facilities, construction industries, and other service operations. This development will create jobs, increase income, shift populations, change residential and commercial development and land use extensively, and degrade the environment." (JA 3522.)

See also the testimony of Mitchell, Smalley, Bybee, Muziani, Coldren, and Thomas summarized above.

Moreover, "potential hazards overlooked or unrealistically evaluated by the Secretary" (Dec. 9; JA 31) could lead to adverse impacts that are permanent and devastating to the coastal environment.

Additionally, there was testimony, and seemingly general agreement that oil and gas production would not occur for at least three years so that even a quick strike would not solve the current oil or gas shortages.

These facts established a strong equity on the side of the plaintiffs that with the program only just beginning, and the Sale 40 EIS inadequate, it should be stopped now until the Secretary of Interior produces an adequate EIS and has the option of imposing conditions on the leasing dictated by that analysis.

Further, as the Court found, there was absolutely no evidence that bidding again, after an EIS is properly prepared, would result in lower payments to the government than before. Thus, rescission of the leases would not harm the public. (Dec. 95; JA 118.)

From the point of view of the oil industry, the facts and equities were nowhere near so strong. It was shown that the oil industry's investments into research had been done well before the Secretary had determined to hold the sale, so that it was risk money to start (JA 1900-02), and that the information obtained

from prior expenditures was available for subsequent bidding. Lastly, one oil company executive testified that his company had taken steps to minimize risks by putting cut-off dates into its contracts employing drilling rigs. (JA 1923-24 .)

Accordingly, there was ample evidence to support the action of the District Court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DECIDED THAT NEPA HAD BEEN VIOLATED IN FIVE MAJOR RESPECTS

A. Introduction and Summary of the Argument

The District Court's decision finding major violations of the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321 et seq., is correct. With respect to each of the violations the District Court correctly interprets the requirements of NEPA. It correctly applies these requirements to the facts of the case, taking into proper account the nature of the project at issue. It focuses on the very issues raised by the plaintiffs and others in testimony and comments on the Sale 40 Draft Environmental Impact Statement (DEIS). Finally, the administrative record and record developed in the District Court show that the information necessary to rectify the inadequacies was available to the Secretary or his agents during the preparation of the Sale 40 EIS, but they chose to ignore it.

NRDC will discuss below in detail the manner in which the District Court's decision satisfied these criteria with respect to each of the five violations of NEPA. Before turning to this discussion, we address briefly certain arguments made by defendants which recur throughout their briefs.

In attacking the District Court's decision, the defendants make the following arguments. First, defendants claim that the District Court failed to apply the "rule of reason" under NEPA. Second, they claim that the District Court engaged in substantive review, substituting its judgment for that of the Secretary of Interior. Third, defendants state that the District Court engaged in a de novo review, rather than basing its decision on the administrative record. Fourth, they claim that the issues on which the decision rests were raised by the District Court sua sponte. Finally, defendants argue that the District Court was precluded from reaching certain issues because of its previous order on the preliminary injunction. On each of these arguments, defendants are wrong.*

The District Court correctly applied the "rule of reason" under NEPA, as articulated by this Court, as well as other courts.

*The federal defendant also argues that the appropriate standard of review of the District Court's findings is not the normal "clearly erroneous" standard. (Federal defendant's Brief at 6 fn 5). Defendant cites Crane Co. v. American Standard, Inc., 490 F.2d 332, 341 fn 12 (2d Cir. 1973) in support of this proposition. That decision involved largely undisputed facts. Here, the District Court's findings rested on the resolution of sharply disputed facts and on extensive oral testimony, as well as documentary evidence. Thus, the findings of the District Court are appropriately judged under a "clearly erroneous" standard. Fed. Rules of Civil Procedure, R.52(a). This Court recently, in another NEPA case, New York v. NRC, 9 ERC 1825, 1831 (2d Cir., Feb. 14, 1977) (appeal from denial of preliminary injunction) stated:

"[t]he appellate court's enlarged right of review is a discretionary right and not a duty to burrow into the documentary record in exactly the same way the district court should. As was stated in Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.,

(footnote continued)

With respect to each of the violations, NRDC will show that the Court below restricted its findings of NEPA violations to those issues for which analysis in the EIS was both "meaningfully possible" and "reasonably necessary" for an understanding of the environmental consequences of the proposed leasing.*/

The District Court did not engage in substantive review under NEPA. Rather, as NRDC will show, the Court expressly disavowed such an approach. The Court actually applied the same

(footnote continued)

505 F.2d 989, 1004 (2d Cir. 1974) (emphasis supplied). 'Orvis stands for the proposition that a record consisting only of pleadings, depositions, and affidavits may, at the reviewing court's discretion, be reviewed de novo.' See Dopp v. Franklin National Bank, supra at 879; San Filippo v. United Brotherhood of Carpenters & Joiners, supra at 511; Munters Corp. v. Burgess Industries, Inc. supra at 211 n. 4."

The Court went on to state the circumstances under which that discretionary right may be properly exercised: (1) Where the remedy of preliminary relief has been granted on the basis of a documentary record; (2) Where the findings made by the trial court are not specific, detailed and clearly articulated; (3) Where there exist defects in the record of the district court proceedings apart from the findings themselves. 9 ERC at 1831. None of these is applicable to the case at hand.

*/Only two other circuit courts have so far ruled on NEPA challenges to OCS leasing decisions. Each applied the rule of reason to the factual record developed in the court below. In NRDC v. Morton 458 F.2d 827 (D.C. Cir. 1972) the court found the EIS inadequate for its failure to consider reasonable alternatives. In Sierra Club v. Morton 510 F.2d 813 (5th Cir. 1975) the court upheld the EIS. These two cases illustrate the point that the adequacy of each EIS must be judged on the basis of the factual record in that case. Therefore, defendants' argument to this Court that the upholding of other OCS EIS's on other leasing decisions based on other facts validated the EIS and the leasing decision at issue here is clearly erroneous.

standard of review approved by this Court in Chelsea Neighborhood Assoc. v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975).

The District Court did not act improperly in relying on expert testimony adduced at the hearing on the preliminary injunction and at the trial. As the statement of facts demonstrates, that testimony related specifically to issues raised during the administrative proceedings and showed that there was information available to the Secretary at the time the EIS was prepared which could and should have been used in the NEPA analysis. Indeed, the District Court refused to accept evidence relating to information available after the time of the preparation of the EIS. As NRDC will show below in Section D, other courts have relied on such testimony in concluding that an EIS was inadequate.

The District Court founded its decision on issues raised by plaintiffs, federal agencies, state and local governments during the course of the Department of the Interior's preparation of the Sale 40 EIS. It, therefore, did not develop these issues sua sponte, but rather was convinced by the evidence that several of these issues raised earlier were important and had not been adequately considered by the Secretary.

There is no "law of the case" rule which ties the District Court's determinations after a full trial on the merits to an earlier determination made on a preliminary motion which is a limited proceeding.

We now turn to the five separate NEPA violations which the District Court found.

B. The Secretary's Failure to Consider the Impacts of
State and Local Exercise of Regulatory Power

1. The District Court's Findings and the
Evidence Supporting Them

The District Court found that the site-specific, pragmatic, empirical effects on the leasing program from the likely exercise of state and local authorities were virtually ignored in the Sale 40 EIS (Dec. 9, 20; JA 31, 42): "It is not sufficient to cram an enormous volume full of generalities or to consider in depth irrelevant, tangential or marginal factors." (Dec. 20; JA 42) The District Court found that the Department of the Interior had been requested to undertake such an analysis in the Sale 40 EIS,^{*/} that the information upon which such an analysis could be based was publicly available at the time the EIS was prepared (Dec. 21; JA 43), and that the comments and testimony of state and local governments should have alerted the Secretary to the fact that governmental powers may be utilized to oppose pipelines and tanker-related onshore facilities.^{**/} (Dec. 14; JA 36).

^{*/}Testimony of Governor Byrne of New Jersey on the Sale 40 DEIS, cited in the District Court's Decision at 11-12.

^{**/}The State of New York raised the possibility of state opposition in its comments on the Sale 40 Draft Environmental Impact Statement,

(footnote continued)

The testimony summarized above in the statement of facts fully supports the District Court's findings.

The District Court was correct in concluding that the Sale 40 EIS should have considered the body of controls and the effects of their use on the leasing program and on the environment. Had a meaningful analysis been undertaken the Secretary might have structured the program differently so as to mitigate the adverse environmental impacts flowing from such opposition: different tracts might have been leased; different lease stipulations might have been included to reduce local opposition by insuring greater environmental protections. Instead, the impact statement lowered on these problems a curtain of abstractions and avoidance.

2. The Court Applied NEPA Correctly

Given the deficiencies of the EIS, the District Court correctly concluded that NEPA was violated. The very purpose of the EIS is to inject the input of environmental considerations "at every distinctive and comprehensive stage of the [decision-making] process." Calvert Cliffs' Coordinating Committee v. AEC

(footnote continued)

where it pointed out that states may not approve pipelines. (3 EIS 224 item 49). The State of New Jersey raised the issue in Commissioner Bardin's letter to the Department of Interior where he pointed out that New Jersey was evaluating pipelines as a risk to public safety, to the tourist industry, or to other important resources of the Atlantic Coast (3 EIS 242). See also, testimony of Cape May County, Ocean County and the Tri-County Committee--the areas through which pipelines are most likely to be routed--on the Sale 40 DEIS stating their opposition to the leasing program as presently structured and signalling their potential opposition. (JA 3014-3045.)

449 F.2d 1109 (D.C. Cir. 1971), cert denied, 404 U.S. 942 (1972). Where a federal agency fails to detail environmental impacts, it forecloses meaningful integration of these factors into its decisionmaking process and frustrates the purposes of the EIS and NEPA itself.

This Circuit has declared:

"It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed actions and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement,' Monroe County Conservation Society v. Volpe, 472 F.2d at 697-98." NRDC v. Calloway, 524 F.2d 79, 92-93 (2d Cir. 1975)

See also, Chelsea Neighborhood Ass'ns v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975); Monroe County Conservation Council, Inc. v. Volpe, supra, 472 F.2d at 697 (NEPA is, "at the very least, 'an environmental full disclosure law.'") The Council on Environmental Quality Guidelines on Preparation of Environmental Impact Statements 40 C.F.R. Part 1500, specifically require an analysis

The relationship of the proposed action to land use plans, policies, and controls for the affected area. This requires a discussion of how the proposed action may conform or conflict with the objectives and specific terms of approved or proposed Federal, State, and local land use plans, policies, and controls...Where a conflict or inconsistency exists, the statement should describe the extent to which the agency has reconciled its proposed action with the plan, policy or control, and the reasons why the agency has decided to proceed notwithstanding the absence of full reconciliation.

40 C.F.R. §1500.8(a)(2)
(emphasis supplied)
(Dec. 21; JA)

The District Court's ruling goes no further than to compel compliance with the CEQ guidelines.^{*/} The District Court's ruling also comes within the "rule of reason." New York, NRDC v. Kleppe, 97 Sup. Ct 4,6(1976); Natural Resources Defense Council v. Callaway, supra at 88. The District Court's finding that an analysis of the environmental consequences likely to result from state and local actions taken to restrict OCS development^{**/} was both meaningfully possible and reasonably necessary for the Secretary and the public to evaluate the project (Dec. 19-20; JA41-42), fits squarely into the holding of NRDC v. Callaway, supra.

Contrary to the claims of the defendants, it is not "impossible" for the impact statement to contain such a meaningful discussion. Nowhere is the Secretary asked to predict the outcome of political controversies or to make any other "crystal ball inquiry." What the District Court held is that there must be analysis of likely adverse impacts based on present knowledge and information, and that the Secretary did not do it. Present knowledge and information clearly reveal that states and localities have control over decisions which can affect the leasing program and also that there is stated opposition to the program as presently

^{*/}These guidelines are entitled to considerable weight since CEQ was established by Congress in NEPA itself to ensure that the Act was faithfully enforced. 42 U.S.C. §4243. See EDF v. TVA, 468 F.2d 1164, 1178 (6th Cir. 1972) (CEQ Guidelines are "entitled to great weight."); Accord Ely v. Velde, 451 F.2d 1130, 1135-6 note 14 (4th Cir. 1971).

^{**/}The District Court found that: "It is the impact of local authority, not its mere existence, that must be studied and evaluated." (Dec. 19; JA 41).

structured. Therefore, an analysis of the tools presently available to them and the impacts is both "meaningfully possible" (NRDC v. Morton, supra at 837) and "reasonably necessary" (NRDC v. Callaway, supra at 93).

3. The Secretary's Failure to Consider the Issue
is Not Excused Under NEPA Law

Defendants ignore the record as to opposition to pipeline-related facilities, ignore public comments suggesting the use of state or local powers to restrict pipelines, and assume withall that nothing short of an expressly-declared intention to bar pipelines would have enabled the Secretary to gauge the probable extent of state or local cooperation or opposition. Even within the scope of its much too narrow focus, defendants fail to mention, for example, the firm opposition to pipelines publicly expressed by Cape May County prior to May, 1976, as well as the wealth of public comments during the Sale 40 administrative proceedings, which clearly signalled potential opposition of states, counties, and municipalities.

Even had the comments of states and localities not brought this matter boldly to the attention of the Secretary and his agents,^{*/} no court has ever excused an EIS deficiency on the ground that plaintiff failed to raise the issue in the administrative proceeding prior to final publication of the EIS.

^{*/}Defendants argue that these comments put the Secretary on notice that opposition existed and, therefore, the EIS itself did not have to address the issue. This argument is patently false. Once having been put on notice of such opposition, the Secretary or his agents had the responsibility of discussing in the EIS the effects of such opposition on the leasing program and appropriate means of mitigation.

The most extreme rule enunciated by any court is that such lack of public comment "may be taken into consideration in passing upon the adequacy" of an EIS. NRDC v. TVA, 367 F. Supp, 128, 131 (E.D. Tenn. 1973), aff'd per curiam, 502 F.2d 852 (6th Cir. 1974). See also Sierra Club v. Morton, 510 F.2d 813, 826 (5th Cir. 1975). This merely means that some consideration of the lack of comment might be appropriate if, under the rule of reason, it is not otherwise apparent to the reviewing court that NEPA requires treatment of the topic in the EIS.

Even this very different, very modest proposition of the court in NRDC v. TVA, supra, has met with a cautious reception. The per curiam affirmance of NRDC v. TVA by the Sixth Circuit did not explicitly adopt it. NRDC v. TVA, 502 F.2d 852 (6th Cir. 1974). The Eighth Circuit, in affirming EDF v. Froehlke, 368 F. Supp. 231 (W.D. Mo, 1973), expressly noted (a) that the lower court's mention of the NRDC v. TVA-rule was dictum only and (b) that the Eighth Circuit was not endorsing that rule, even as dictum, in its own opinion. EDF. v. Froehlke, 497 F.2d 1340, 1342 (8th Cir. 1974).

In any event, the very limited and circumspectly stated NRDC v. TVA-rule, which the Second Circuit has not approved, has no application to this case. Even if, contrary to the record, there had been no public comment indicating that a state or local government intended to bar pipelines, this lack of specific comment would not, under the NEPA rule of reason, excuse the failure of the Sale 40 EIS to discuss the likelihood of such opposition. On the contrary, the very real possibility of such action by a state or local

government was amply attested to by the extent and depth of general concern with onshore impacts expressed in state and local government comments, as indeed in plaintiff NRDC's comments as well. Thus, the Department of the Interior had a clear duty to revise its Draft EIS so as to provide a meaningful discussion of this topic in the light of what was said during the administrative proceedings.

More fundamentally, the NRDC v. TVA-rule is also inapplicable where, as here, the importance of a topic neglected in an EIS is apparent quite apart from what comments were made during administrative proceedings. As this Court itself remarked, the omission from the Sale 40 EIS of "a realistic appraisal" of "the probable extent of state cooperation or opposition" meant that

"...an assumption the Secretary considered material to the decision is invalid or that available information needed for informed decision was not properly presented."

(Order 66,71; JA221,226.)

As to any topic that is plainly material, the courts have repeatedly and consistently held that the lead federal agency bears primary responsibility for fulfilling NEPA's requirements and that, accordingly, the agency cannot blandly rely on other interested parties, public or private, to prod it to perform essential environmental analysis. Calvert Cliffs' Coordinating Committee v. AEC, supra at 1118-19. See also EDF v. TVA, 468 F.2d 1164, 1183 (6th Cir. 1972); NRDC v. Morton, 388 F. Supp. 829, 834n6 (D.D.C. 1974); City of New York v. United States, 337 F. Supp. 150, 160 (E.D.N.Y. 1972) (3-judge court). Cf. Aeschliman v. NRC, 9 ERC

1289, 1293 (D.C. Cir. 1976). This responsibility is clearest and strongest under circumstances such as those in the present case where the federal agency itself is the prime mover of the action under NEPA scrutiny.

4. The Secretary's Failure to Consider the
Issue is Not Excused by the Possibility
of Future Coastal Zone Planning

The defendants attempt to argue that the issue of state and local opposition to pipelines and related OCS onshore facilities is essentially made irrelevant because of planning being undertaken by coastal states pursuant to the Federal Coastal Zone Management Act (CZMA), 16 U.S.C. §§1451 et seq. This argument is fallacious since these state programs may reasonably prohibit or restrict pipeline landfalls in coastal areas and still qualify for approval under the CZMA. Thus, the coordination required under the Act may result in the prevention or restriction of pipeline landfalls and onshore OCS facilities, rather than the provision of such facilities as defendants presume.

The CZMA does not require a state to site energy facilities in the coastal zone. Thus, a state may implement an approved program so as to exclude energy facilities as long as its actions are not arbitrary and capricious. And as the testimony of several local and county witnesses demonstrated in this case, the placing of severe restrictions, even prohibitions, on oil-related

facilities, including pipelines, in New Jersey coastal counties, could well constitute a rational decision based on sound economic and environmental sense.*/

The legislative history of the CZMA fully supports this view of the respective state and federal roles in CZM program development and implementation. The purposes of the CZMA were reiterated just this past summer by the Senate and House conferees:

"...a strengthened coastal zone management program, with full participation by the States, is vital to the protection and proper management of irreplaceable coastal resources and is the best means of dealing with the impacts from new or expanded coastal energy activity;...(5) that the coastal states and localities, which are closer to and more cognizant of the situation, should make the basic decisions as to the particular needs which result from such new or expanded energy activity; and (6) that the discretion

*/It is important to note in this respect that New Jersey, in its coastal planning process, is considering the following policy alternatives with respect to OCS-related development:

"Policy Alternatives

1. The State could support OCS development consistent with protecting its unique environment and maintaining a viable tourist economy in the coast.
2. OCS facilities could be located in or near existing industrial areas which have suffered blight, unemployment and decline, and are in need of redevelopment.
3. OCS activities could be directed away from popular beach resorts, wetlands and barrier beach islands."

* * *

New Jersey Department of Environmental Protection, Alternatives for the Coast (1976) (JA 2786-2787.)

Implementation of such a policy might well result in a restriction on pipeline landfalls and OCS facilities in New Jersey's Atlantic coast areas which are heavily dependent on tourism and are also ecologically vulnerable.

of the Secretary of Commerce and other federal officials should be correspondingly limited.
[Emphasis added.] (Report of the Committee on Commerce on S. 586 Conf. Rep. No. 94-1298, 94th Cong. 2nd Sess. 1976, p. 24.) (Court Exh. 3, Prelim. Hear)

This quote sounds a theme which recurs throughout the CZMA and the agency implementing regulations. 15 CFR Part 923. The theme is that basic land use decisions will remain with the states. Of note in this regard is the following comment on the requirement that state programs provide for adequate consideration of the national interest involved in the siting of facilities necessary to meet requirements which are other than local in nature:

"The requirement should not be construed as compelling the States to propose a program which accommodates certain types of facilities, but to assure that such national concerns are included at an early state in the State's planning activities and that such facilities are not arbitrarily excluded or unreasonably restricted in the management program without good and sufficient reasons." (15 CFR §923.15, "National interest in siting of facilities.")

In connection with a new requirement of the Act (Section 305(b)(8)) that a state program contain an energy facility planning process component, the Senate Report was careful to state:

"The Committee wishes to emphasize, consistent with the overall intent of the Act, that this new paragraph (8) requires a state to develop, and maintain a planning process, but does not imply intercession in specific siting decision. The Secretary of Commerce (through NOAA), in determining whether a coastal State has met the requirements, is restricted to evaluating the adequacy of that process. [Emphasis added.] (Report of the Senate Committee on S. 586. Sen. Report No. 94-277, 94th Cong., 1st Sess. 1975, p. 34.) (Court Exh.4, Prelim. Hear.)

The House Report echoes this sentiment:

"The Committee in no way wishes to accelerate the location of energy facilities in the coasts; on the contrary, it feels a disproportionate share are there now. For those facilities which necessarily will be on the coasts, however, a specific planning process for siting such facilities and dealing with their socio-economic and environmental impacts is desired. There is no intent here whatever to involve the Secretary of Commerce in specific siting decisions. [Emphasis added.] (Report of House Committee on Merchant Marine and Fisheries on H.R. 3981. Hse. Report No. 94-878, 94th Cong., 2d Sess. 1976, pp. 45-46.)(Court Exh.5 Prelim.Hear)

If federal and state coordination is to be furthered so as to reduce the potential adverse impacts flowing from the leasing program, then the Sale 40 FES must adequately disclose the adverse impacts which lack of coordination would produce. Yet the very disclosures which would accomplish this end are the ones now resisted by the defendants.

Furthermore, the defendants have chosen to overlook the role of local governments in state CZM programs. The CZMA does not require a CZM plan in which the state has total supervision over local action. The Act specifically provides, and many states are choosing, to give local governments an active role in the CZM process.*/ This process allows for state review of local actions

*/CZMA Section 306

"(e) Prior to granting approval, the Secretary shall also find that the program provides:

(1) for any one or a combination of the following general techniques for control of land and water uses within the coastal zone; (A) State establishment of criteria and standards for local

(footnote continued)

but does not necessarily restrict local governments from acting. Therefore, the NOIA defendants are mistaken in their assertion that the CZMA creates "a single decisionmaking apparatus in the state." (NOIA Brief at p. 28)

(footnote continued)

implementation, subject to administrative review and enforcement of compliance; (B) Direct state land and water use planning and regulation; or (C) State administrative review for consistency with the management program of all development plans, projects, or land and water use regulation, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice an opportunity for hearings."

C. The Failure to Consider the Environmental
Impact of Specific Probable Pipeline Routes
From the Outer Continental Shelf

1. Court's Findings and the Evidence Supporting them

The District Court found that the Secretary's deferral of all consideration of likely pipeline routes until after discovery of oil and gas borders on the "irresponsible" in view of NEPA's mandate that all potential environmental considerations be weighed prior to the decision to proceed with major federal programs. The United States Coast Guard, in its comments on the Sale 40 DEIS, stated:

"To adequately assess the implications and potential impacts of pipelines located along various segments of the coastline, it would be of considerable value to know the general areas being considered for pipeline corridors. Thus, it is suggested that the first phase of the proposed pipeline corridor management studies, monitoring the identification of tentative corridors, be conducted prior to, and incorporated in, the final impact statement.

3 EIS 99*

The District Court's decision falls directly within the rule of reason:

*At least six groups (State of Maryland, Cape May County Planning Board, and others) also stated that the Sale 40 EIS should provide more specific information regarding anticipated pipeline landfall zones and resulting offshore and onshore impacts.
3 EIS 30.

NEPA required the Secretary to explore the site-specific impacts of pipelines along definite routes, at least to the extent that such routes were ascertainable based on information available at the time. (Dec. 27, JA 49.) (Emphasis supplied)

Therefore, only such analysis as was meaningfully possible was required by the Court below. The Court found that such analysis was reasonably necessary in order to adequately inform federal, state, and local decision-makers and the public of the alternative modes and routes of transport of Sale 40 oil and gas and to enable government decision-makers to understand and plan to cope with the impacts. (Dec. 36; JA 58.)

As the statement of facts demonstrates, there was overwhelming evidence in the record that an analysis of likely pipeline routes could have been undertaken by the federal government at the time of the preparation of the Sale 40 EIS. Mr. Brunjes, for example, testified that he was able to predict fairly closely the landing sites and best routes, based upon generally available information, and that experienced people would tend to line out the most suitable tracts or identify them without too much effort. (JA 1724-1728.)*

*Ms. Gresham, one of the federal defendant's witnesses and an employee of the Department of the Interior, had testified earlier that the government possesses the same geological and geophysical information the oil companies have (JA 1674). This fact, combined with Mr. Brunjes' testimony to the effect that he utilized publicly available information in predicting likely landfall areas and routes highlighted to the Court below that the government had access to all of the relevant information necessary for the analysis.

This does not mean, as defendants attempt to argue, that Mr. Brunjes' routes were the precise ones which should have been considered in the Sale 40 EIS or that the EIS should have detailed the exact routes pipelines would take. Mr. Brunjes' analysis showed only that this type of analysis could be done, not that it was necessarily the right or most reasonable analysis which could be made. (For example, Mr. Brunjes made no analysis of pipeline routes to northern New Jersey, although the single largest bidder, Exxon, has its refineries in northern New Jersey.) And, no one, particularly not the District Court, expected exact routes to be projected.*

NEPA requires an analysis of possible environmental impacts flowing from a proposed project. A certain amount of projection, so long as it is not "crystal ball inquiry," is simply essential where the future, long-range, impacts of a major project are involved:

"It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of a proposed action before the action is taken and those effects fully known. Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA

*The Court below continually refers to "likely" pipeline locations (Dec. 24, 26, 35; JA 46, 48, 57). Defendants attempt to confuse the terms "specific" and "likely" with "exact." The statement that specific likely pipeline locations could and should have been considered is not the same as saying the exact routes which pipelines will ultimately take can or should be determined now.

by labeling any and all discussion of future environmental effects as "crystal ball inquiry." Scientists' Institute for Public Information v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973); Accord, City of Davis v. Coleman, 521 F.2d 661, 677 (9th Cir. 1975).

An analysis of likely pipeline routes is not only meaningfully possible, but reasonably necessary to a full appreciation of the adverse environmental impacts of the project. Only when a probable route is determined can likely adverse environmental impacts be defined and considered. As the District Court pointed out, if one likely pipeline route is determined to be up the Delaware Bay estuary, the impacts of construction of such a pipeline on marine life and the shellfish industry should have been considered. (Dec. 34-35; JA 56-57.) The impacts of a route across land would involve different impacts such as disruption in urban areas. Again, environmental impacts flowing from location of such facilities vary according to the areas the routes traverse. It is for this reason that an analysis of specific, probable routes is so necessary.*/-

The District Court was correct in holding that an analysis of the economic feasibility of different pipeline routes as against

*/-Central to the federal defendant's argument that the District Court's requirement of a pipeline analysis violated the rule of reason is its view that the impact of the use of pipelines is restricted to increased oil spillage. (Government Brief at 26). In this, the government is clearly wrong since the record shows that pipeline locations determine the location of secondary impacts such as downstream industries which themselves pollute. The government's characterization of pipeline impacts is therefore extremely crabbed.

tankers should and could have been undertaken (Dec. 37-43; JA 59-65). Brunjes' testimony clearly showed it could be done. This type of analysis is needed in order to determine how the economic feasibility of pipelines may be affected by state and local opposition that leads to longer pipeline routes; (pipeline costs may approximate tanker costs in such a situation.) Consideration of the relative economic feasibility of pipelines versus tankers is particularly important because proposed Special Lease Stipulation No. 4, which was included in the Sale 40 leases, provides for pipeline transport of oil and gas if, inter alia, such pipelines are "economically feasible." 2 EIS 463. An economic analysis of the feasibility of pipelines as opposed to tankers, based on a projection of likely pipeline routes, would have permitted the Secretary and the public to judge the value of that stipulation. For example, it might well have turned out upon analysis, that the only feasible pipeline routes are more expensive than tanker routes.* / Had this analysis been undertaken in the EIS, the Secretary might have decided to include a more stringent stipulation in the lease or otherwise altered his decision.

* / Defendants argue that Mr. Brunjes' testimony shows that for those pipeline routes he examined, pipelines are generally cheaper than tankers. Mr. Brunjes compared pipelines to the longest possible tanker route. All Mr. Brunjes' testimony did demonstrate was that the most economic means of transportation to Philadelphia is the direct route from the producing fields through New Jersey to the refineries in the Philadelphia area. He stated that for other routes, the economic feasibility of pipelines versus tankers became questionable, especially if being compared to shorter tanker routes. (JA 1783-1786.)

2. The Court Applied NEPA Correctly

Where information is available to the Secretary or his agents and meaningful analysis is possible on issues of such environmental significance, the Interior Department has an obligation under NEPA to disclose the information and undertake the analyses. This failure is all the more glaring where, as here, other federal agencies, state and local governments specifically objected to the lack of such information and analyses. (3 EIS 30).

The failure of the EIS to analyze this very important question in a meaningful fashion flaunts the purpose of NEPA. As carefully articulated in Sierra Club v. Coleman, 9 ERC 1314, 1317 (D.D.C., Sept. 23, 1976), appeal docketed, No. 76-2158 (D.C. Cir., Nov. 19, 1976):

...NEPA requires that the agency make such a decision knowingly and with due regard for its environmental consequences. ...the FES simply did not provide the information which would be needed for such an informed balancing and decisionmaking in this regard. The speculation and conjecture with which the document discussion is replete are not justified by any limitations of available information sources or analytical tools, and do not satisfy the agency's obligation under NEPA. (emphasis supplied)

In this context, it is important to note that the Sale 40 EIS is a "site-specific" impact statement: its purpose, as distinct from the Programmatic EIS, is to examine the impacts of the proposed lease sale on the specific environment of the Mid-Atlantic region. The Sale 40 EIS does not fulfill this function.

3. The Appropriate Time for the Analysis is Now

Defendants argue that the projection of likely pipeline routes, their environmental impacts and economic feasibility, is unnecessary at this time since the amount of hydrocarbon resources in the Baltimore Canyon is not yet known and since there will be subsequent opportunities to analyze such issues.^{*/} On this point, they are wrong.

Defendants' argument that the issue need not be faced in the Sale 40 EIS, but can wait until oil is discovered might be valid if the Secretary had chosen to separate leasing for exploration from leasing for development and production. However, the Secretary has not. The Secretary has leased the rights to explore, develop and produce all at one time. The EIS on this leasing decision must therefore have considered the environmental impacts of the development and production phases which include transport of oil ashore.

In order to fully comprehend the necessity for as full an analysis of impacts as is possible prior to leasing, it is necessary to understand the nature of the decisions made at the time of

^{*/}Defendants point to Secretary of the Interior Andrus' promise to do an EIS on the transportation and development phases of Sale 40 leasing to support their argument. It is important to note that Secretary Andrus did not make this promise until after the decision of the District Court below and this promise is tantamount to an admission that the present EIS is insufficient in addressing the impacts of transportation and development. But, as NRDC will show, now is the time for these impacts to be addressed, before leasing and not later when the Secretary's powers are circumscribed.

leasing and the degree to which the Secretary is thereafter locked in by these decisions.

At the time of leasing, the Secretary makes several key choices which are thereafter immutable: the areas of federal land to lease; the lease terms which will govern the relationship of the Secretary and the lessee for the remainder of their relationship, which may last as long as oil and gas are produced in paying quantities;*/ the leasing all at one time of the rights to explore, develop and produce; establishment of the regulations which will govern leasing operations.**/ These all involve critical decisions which will affect the pattern of development and production, including the transport of oil and gas ashore, and the environmental impacts therefrom for the next 20-30 years.

The lessees thus obtained vested rights at the time of leasing which may not subsequently be divested. In this connection, it is important to point to Special Stipulation No. 4 which is contained

*/Section 8(b)(2) of the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §1337(b)(2).

**/In this respect it is critical to note that the Secretary's power to cancel a lease is limited under existing law to the lessee's failure to comply with the OCS Lands Act, the lease or regulations issued under the OCS Lands Act, 43 U.S.C. §1334(b)(1),(2). In Union Oil v. Morton, 512 F.2d 743 (9th Cir. 1975) it was held that a lease could be cancelled only for lessee's failure to comply with regulations in existence at the time the lease was issued. Violation of subsequently adopted regulations may not lead to lease cancellation, thus limiting the Secretary's power to enforce such subsequently adopted regulations. See also, Section 5(a)(2) of the OCS Lands Act, 43 U.S.C. §1334(a)(2).

in the Sale 40 leases. This lease provision, inter alia, means that a lessee may bring oil ashore by tanker if pipeline transport is shown to be not economically feasible,^{*/} even, for example, if it is technologically feasible. The lessees presumably bid, in part, because of the inclusion of that stipulation in the lease. The Secretary's power, therefore, to decide at a subsequent date that pipelines are the only safe mode of transportation of oil ashore and to require the lessee to transport by pipeline or not at all is limited.

Where, as here, irreversible and irretrievable commitments are being made, courts have consistently required NEPA statements to consider subsequent phases of the action. Friends of the Earth v. Coleman, 513 F.2d, 295, 299 (9th Cir. 1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1285 (9th Cir. 1974); Scientists' Institute for Public Information v. AEC, 481 F.2d 1079, 1089 (D.C. Cir. 1973); Calvert Cliffs' Coordinating Committee v. U.S.A.E.C., 449 F.2d 1109, 1128 (D.C. Cir. 1971).

Defendants cite three major cases to support their argument that the analysis need not be done now: Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1974); Greene County Planning Board v. FPC, ___ F.2d ___ (2d Cir., Dec. 8, 1976) ("Greene County IV"); Kleppe v. Sierra Club, 96 S. Ct. 2718 (1976). Each of these cases is distinguishable from the case at hand.

^{*/}The term "economically feasible" is nowhere defined in the NEPA documents.

Sierra Club v. Morton, supra, ("MAFLA") involved a challenge to an EIS prepared on a proposed lease sale in the Gulf of Mexico. There the court held, inter alia, that the EIS was adequate even though it failed to include an analysis of the effects of pipeline location and construction and the impact of pipeline leakage on particular areas. MAFLA is inapposite to this case for many reasons, and dependants' reliance on it misplaced. From MAFLA to this case, there is a wide discrepancy of facts, and an equally wide difference in the evidence before the court, such as the fact that the oil companies can do pipeline routing analyses, such as the fact that communities with tourism-based economies line the New Jersey coast at the places pipelines are likely to land, and such as the fact that the Mid-Atlantic is a wholly frontier area where there has been no experience with OCS oil pipelines and their environmental impacts. This lack of previous experience in the Mid-Atlantic makes an analysis imperative, particularly where it has been demonstrated that the analysis can be done in a meaningful fashion prior to leasing.^{*/}

The recent decision by this Circuit in Greene County IV does not vitiate the District Court's finding and conclusion. In

^{*/}Defendants also rely heavily on MAFLA for the proposition that an "exhaustive" study is not required on pipeline locations. Defendants miss the point. The District Court found that pipeline routes were analyzed from available information by the oil companies, and that the Secretary had not even been as "conscientious" as they had.

that case, the Court held that since the project at issue (the Gilboa-Leeds transmission line) was fully justified on the grounds that it was needed for the existing Gilboa Storage Facility, there was no need for the EIS to encompass other proposals for which the line would have additional utility; nor, was there a need for the EIS to consider the impacts of a 765 kv transmission line since the approval of the Gilboa-Leeds transmission line was not based on the merits of its being upgradable to a 765 kv transmission line and future upgrading to the 765 kv was not compelled by approval of the project as proposed. As distinct from the project at issue in Greene County IV the project here at issue is the leasing of rights to explore, develop and produce oil and gas resources of the OCS in the Sale 40 region. These phases have been linked together by the Secretary's own choosing. He must, therefore, analyze the impacts of all phases wherever "meaningfully possible" and "reasonably necessary." The Secretary has never denied that pipelines are a part of the project at issue. Particularly, since decisions are made concerning pipeline transport at the leasing state (see e.g., Special Lease Stipulation No. 4), as full an analysis of pipeline transport must be included in the Sale 40 EIS as is meaningfully possible.

Finally, defendants' citation to Kleppe v. Sierra Club, ____ U.S. ____ (1976) is inapposite. Kleppe dealt with whether or not a regional, non-site-specific impact statement had to be prepared. This action deals with a site-specific statement which

we have shown is the logical and proper time and place to deal with the specific issue.

For the above-stated reasons, the District Court's findings that the failure of the EIS to consider specific probable pipeline routes, their environmental impacts, and their economic feasibility, particularly in relation to tankers, should be affirmed.

D. The Secretary's Failure to Prepare
An Adequate Cost-Benefit Analysis

The District Court found that a cost-benefit analysis of the proposed project is "vitally linked to critical NEPA issues." (Dec. 57; JA 79.)

"The Secretary's duty under NEPA to compare Sale 40 to its alternatives, and to weigh the latter and their environmental effects depends upon an accurate cost-benefit analysis of the Sale 40 project, without which the Secretary and other decision-makers cannot adequately determine priorities and the course of action tending most strongly to further the public interest." (Dec. 57; JA 79.)

The District Court found that the economic costs and benefits of the planned action were "seriously and grossly misrepresented or omitted" and therefore "there could be no adequate balancing of economic benefits against environmental costs." (Dec. 58; JA 80.) The evidence, as summarized above, and as more fully discussed in the brief of the County of Suffolk, totally supported the District Court's determination.

The finding fits squarely into the current state of the law on this subject. As was stated in Calvert Cliffs' Coordinating Committee v. AEC, 449 F. 2d 1109, 1123 (D.C. Cir. 1971):

"NEPA mandates a case-by-case balancing judgment on the part of federal agencies. In each individual case, the particular economic and technical benefits of planned action must be assessed and then weighed against environmental costs."

Chelsea Neighborhood Association v. U.S. Postal Service, 516 F.2d 378 (2nd Cir. 1975) ("NEPA, in effect, requires a broadly defined cost-benefit analysis of major federal activities."); Alabama ex rel Baxley v. Corps of Engineers, 411 F.Supp. 1261 (N.D. Ala. 1976) ("NEPA requires that environmental and non-environmental factors be quantified where reasonably possible and included in a cost-benefit analysis in the project EIS.")

These cases are all responsive to the CEQ Guidelines, 40 CFR 1500.8(a)(4):

"In each case the analysis [of the proposed action and alternatives] should be sufficiently detailed to reveal the agency's comparative evaluation of the environmental benefits, costs and risks of the proposed action of each reasonable alternative."

1. The District Court Did Not Engage in Substantive Review of the Sale 40 Cost-Benefit Analysis

Undaunted by the fact that the District Court explicitly disavowed review of the substantive merits of Sale 40 (Dec. 57A; JA 80), defendants nevertheless persist in attacking the judgment of the Court below on the theory that in finding the Sale 40 cost-benefit analysis defective, Judge Weinstein impermissibly engaged in substantive judicial review.

The District Court did not engage in substantive review and the District Court's handling of the cost-benefit analysis is, upon examination, entirely in accord with accepted principles of

judicial review under NEPA.

In maintaining that substantive NEPA review is impermissible, defendants cite Kleppe v. Sierra Club, 96 S.Ct. 2718, 2731 n.21 (1976) and the decision of this Court in Hanly v. Mitchell, 460 F.2d 640, 643 (2d Cir. 1972) [Hanley II].

Under these decisions it would have been impermissible for the District Court to decide whether, on the merits, Sale 40 should have been approved, that is, to "substitute its judgment for that of the agency as to the environmental consequences of its actions." But the District Court did not do that.

The propriety of the District Court's NEPA review is measured not only by Judge Weinstein's disavowals of substantive review on the merits but by his crystal-clear affirmative statement of the Court's limited and proper function in undertaking a NEPA-review of Sale 40. In the words of his decision, the "question posed is whether [the Secretary's] decision was fully and accurately informed" and whether his decision was "made after adequate consideration of viable alternative programs and potential adverse environmental impacts." (Dec. 2; JA 24 [Emphasis supplied.]) The District Court thus clearly understood the limits of Kleppe and Hanly and stayed within them.

Inspection of the cost-benefit review discloses that the District Court does not conclude that the Secretary erred in approving Sale 40 because of miscalculation or mis-estimation of

costs and production levels. Rather, the District Court concluded that the Secretary was not fully and accurately informed about costs and production levels, matters which would materially affect the balance of environmental costs against economic benefits. The Court concluded that the failure to conduct a meaningful inquiry into these costs and the production levels meant that "there could be no adequate balancing of economic benefits against environmental costs." (Dec. 58; JA 80.)

There can be no quarrel that an agency violates NEPA when its decision rests on a data base that precludes an adequate balancing of income benefits against environmental costs. Judicial review that reaches such a conclusion is not an impermissible review of the merits. On the contrary, by the action-forcing procedural requirements of NEPA §102(2)(C), Congress imposed upon all federal agencies the duty of making environmentally-sensitive decisions on an adequate data base. NEPA review required the District Court "to insure that the agency has taken a 'hard look' at environmental consequences." Kleppe v. Sierra Club, supra at 2731 n.21. Clearly, where the decision-making data base precludes an adequate balancing of economic benefits against environmental consequences, the responsible agency has failed to take the requisite "hard look." Therefore, not only was the District Court's review of the Sale 40 cost-benefit analysis not an impermissible review on the merits, it was a review mandated under NEPA which,

based on the evidence before the Court, resulted ineluctibly in a determination that NEPA had been violated.

Defendants' allusions to the "arbitrary or capricious" standard of review are disingenuous; although they are not likely to mislead this Court, they must be laid to rest.

Both defendants' briefs note that the District Court found the Secretary's decision on Sale 40 to be arbitrary and capricious in respect to the defective cost-benefit analysis. Both briefs, by innuendo, invite the conclusion from this fact that the District Court must have been engaging in substantive review. (Federal Brief, 45; NOIA Brief, 52.) They reason fallaciously that because courts which have expressly engaged in substantive review have applied the "arbitrary or capricious" standard, any court which applies that standard must be engaged in substantive review. NOIA even brashly charges Judge Weinstein with confusion in failing to understand that in applying that standard, he must be engaging in substantive review. It is NOIA, not the District Court, which does not understand.

The Second Circuit has squarely adopted the "arbitrary and capricious" standard as the appropriate standard for review of agency compliance with NEPA. Chelsea Neighborhoods Ass'ns., 516 F.2d 378, 287 n.23 (2d Cir. 1975).

[W]e believe [the court] applied the proper test: Was the agency's consideration of the factors listed in 42 U.S.C. §4332(2)(c) arbitrary, capricious, or an abuse of discretion?

The District Court found that "for NEPA purposes, a failure to make a 'meaningful inquiry' into certain costs and production data made the Sale 40 decision 'arbitrary and capricious.'" (Dec. 58; JA 80.) NOIA objects that such finding does not support such a conclusion.* The objection is wholly unsupported and unsupportable. This Court in Chelsea Neighborhood Ass'ns., supra, 516 F.2d at 388-89, upheld a finding that an agency's NEPA cost-benefit analysis was deficient under the arbitrary and capricious standard (Id. at 287 n.23), where the agency failed to make "a careful and informed decision." The Secretary herein certainly failed to make a "careful and informed" decision when he ignored readily available cost and

*NOIA (NOIA Brief 56) confuses a finding that the data base was intrinsically faulty (as here) with what it characterizes as a "perception" that the data base does not warrant the agency decision. If a court is engaged in substantive review, the latter "perception" would yield the conclusion that the agency decision was arbitrary. But, a court is precluded from finding an agency decision arbitrary on other grounds, as in the present case where the District Court found the data base intrinsically deficient. Note should also be taken that the emphasis supplied in NOIA's quotation from Temple University v. Associated Hospital Service of Philadelphia, 361 F.Supp. 263, 271 (E.D.Pa. 1973) [NOIA Brief, 56], completely alters the sense of the court's statement. To understand the court's meaning, the decision in Temple University must be read as stating that an arbitrary action "is one lacking in rational basis because there is no evidence upon which the decision may be logically based" (emphasis supplied). Thus, properly read, the case does not say that if there was any factual basis, the agency action cannot be found arbitrary and capricious. In any event, the cite to Temple University is irrelevant, inasmuch as it deals with application of the arbitrary and capricious standard in substantive review as contrasted with the procedural review engaged in by the District Court here.

production data which would have critically affected the Sale 40 cost-benefit analysis. The Court below, therefore, was correct.

2. The District Court Did Not Apply an Improper Standard Which Required Mathematical Precision in the Sale 40 Cost-Benefit Analysis

Federal defendant charges that the District Court improperly deviated from the Second Circuit NEPA standard requiring only a "broadly defined cost-benefit analysis" under Chelsea Neighborhoods Ass'n v. U.S. Postal Service, 516 F.2d 378, 386-87 (2d. Cir. 1975). Judge Weinstein, they assert (Federal Brief, 48), found the Sale 40 cost-benefit analysis deficient because it was not rigorous and mathematically precise. (See also NOIA Brief, 59.) But the District Court's decision speaks for itself. What the Court found in the Sale 40 cost-benefit analysis were apparently grossly unrealistic estimates of critical factors, estimates that were apparently off by as much as 100 per cent or more. (Dec. 44, 47, 50, 53, 58; JA 66, 69, 72, 75, 80.) Where the Court found estimates grossly defective, it cannot plausibly be charged with having required more than a broadly defined cost-benefit analysis.

Defendants' extensive citations to the "MAFLA" OCS decision, Sierra Club v. Morton, 510 F.2d 813, 827 (5th Cir. 1975), are accordingly inappropriate. The Court in that case required "enough detail concerning all of these [ecological and economic] costs and benefits to permit reasoned evaluation and decision." Id. That

was exactly the standard applied by the District Court here. Not only is it far-fetched, therefore, to charge the District Court herein with applying the wrong legal criterion, it is also extravagant to charge that the Court committed error in concluding that apparently gross mis-estimates of critical factors precluded a "reasoned evaluation and decision" -- the minimal NEPA requirement set forth in MAFLA itself.

Testimony disclosed that the Secretary ignored significantly disparate cost estimates and production data which were readily available to him at the time from other government sources or agencies with paramount expertise, notably, the Federal Power Commission (Dec. 45, 47, 49; JA 67, 69, 71). These estimates and data concerned environmentally critical factors. (Dec. 57; JA 79.)

Under these circumstances the Court below cannot be said to have misapplied the rule of reason in concluding that the Sale 40 cost-benefit analysis violated NEPA. And, surely, where the Sale 40 EIS and PDOD totally ignored these widely divergent, readily available expert cost and production data, the Court below would have been remiss in passing off the discrepancies revealed in the record on review as mere disagreement among experts.

3. The District Court did not engage
in impermissible de novo review.

We have already noted that although the District Court did indeed find the data base of the Sale 40 cost-benefit analysis

defective, the Court's conclusion that this defect invalidated the Sale 40 decision was directed at a failure of the agency to comply with procedural requirements of NEPA and was by no means a conclusion as to the substantive merits of Sale 40. The District Court did not substitute its judgment for that of the Department of Interior. It did not recalculate the costs and benefits. It did not conclude that the costs were excessive and the sale misguided. Thus, contrary to defendants' contentions, there was no substantive review.

Defendants also contend that the District Court rested its conclusion that the data base was defective on the basis of a new record developed entirely in hearings before the District Court, and that this was error. Defendants are inaccurate again, and fail to establish their claim. An examination of case law shows that the review conducted by the District Court of the Sale 40 cost-benefit analysis, including the factual bases, was altogether proper.

Defendants fail to recognize any distinction between the different kinds of "challenges to the factual bases" of an agency decision. Yet clearly there is an obvious and pertinent distinction between (a) challenging whether the facts warrant an agency decision (which is substantive in character), and (b) challenging whether the agency's data base meets statutory requirements (which is procedural in nature). In Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 414-15 (1971), the Supreme Court specified

the very narrow circumstances under which the Administrative Procedure Act, 5 U.S.C. §706, authorizes a reviewing court to engage in de novo review in response to a substantive challenge as to whether the agency decision is warranted by the facts. But the Overton Park-APA restrictions have no application to plaintiffs' challenge in the present case, which is a procedural challenge as to whether the Secretary of Interior's data base for the Sale 40 decision complied with the §102 requirements of NEPA.

Challenges to the factual bases of agency decisions are the stock in trade of NEPA cases and defendants fail to cite a single case of reversal by a higher court on the ground that review of such a challenge was improper. In the course of reviewing such challenges, the Court routinely hears expert testimony, generating a record for review supplementary to the EIS and any other parts of the administrative record. Moreover, these challenges are frequently addressed to deficiencies in the economic and technical, as well as environmental, bases utilized by the agency in its cost-benefit balancing. Plaintiff has found no instance in which a circuit court has reversed a finding of non-compliance with NEPA on the ground that it was improper for a reviewing court to entertain a challenge to the factual bases of the agency decision, or that it was improper to take cognizance of plaintiff's experts' testimony pointing up factual deficiencies, or that it was improper to review economic and/or technical matters in the decision's data

base.*

Cases cited by defendants in support of their contention

* In Chelsea Neighborhood Ass'ns. v. U.S. Postal Service, 389 F. Supp. 1171 (S.D.N.Y. 1975), aff'd., 516 F.2d 378, the Court permitted plaintiffs to make a challenge to the factual bases of the EIS. Affidavits of plaintiff's environmental consultants and real estate experts were incorporated into the record on review. These affidavits challenged the adequacy of the EIS estimates of air and noise pollution impacts of the proposed post office vehicle maintenance facility and challenged the cost effectiveness of the facility (based on an analysis of taxes, renovation costs, etc.) in comparison with use of an existing garage -- an alternative urged by plaintiffs. In affirming, the Second Circuit took no exception whatsoever to the reviewing of challenges to factual bases of the agency decision and to allowing supplementation of the existing record through plaintiffs' affidavits supporting these factual challenges. Indeed, on the basis of that supplemented record, this Court required that in revising its EIS, the agency should consider use of the existing garage as a possible alternative. Id. at 389.

I-291 Why? Ass'n. v. Burns, 372 F. Supp. 223 (D. Conn. 1974), aff'd. per curiam, 517 F.2d 1077, involved a challenge, inter alia, to the factual bases of the EIS. Judge Blumenfeld concluded -- on the basis of "evidence before me" -- that the EIS gave inadequate consideration to noise and air quality impacts of the proposed highway project. I-291 Why? Ass'n. v. Burns, supra at 256. The evidence generated before the court included not only plaintiffs' experts' testimony but the record of plaintiff's cross-examination of agency-own experts and responsible officials regarding the disputed facts. Id. 254-55. Among plaintiffs' own witnesses was a traffic engineer and transportation planning consultant who testified concerning the feasibility of an alternative route for new highway. The decision of the District Court in the cited case, as here, incorporates lengthy extracts from the court-generated testimony on factual considerations. Id. at 254-55. This Court affirmed per curiam the decision.

In NRDC v. Callaway, 389 F. Supp. 1263 (D. Conn. 1974), rev'd. 524 F.2d 79, plaintiffs were allowed to challenge the factual bases of the United States Navy's choice of a dumping site for dredged material from a channel improvement project required to accommodate a new class of submarines. Plaintiffs adduced "substantial evidence" in court through the testimony of two oceanographer witnesses. These witnesses testified at length regarding the adverse prospective environmental impacts to be expected of the dredged material to be dumped at the Navy's chosen site. See NRDC v. Callaway, 524 F.2d at 82. (Footnote continued next page.)

that judicial review of "the factual accuracy" of the agency's decision bases is improper under NEPA are simply not germane. These cases merely reiterate the irrelevant APA-Overton Park limitations on de novo review.*

It is clear that case law supports the propriety of a reviewing court allowing plaintiff's to introduce new evidence before it bearing on the adequacy under NEPA §102 of the factual bases of an agency's decision. Defendants incorrectly attempt to challenge this propriety by introducing in their briefs an entirely irrelevant discussion of the impropriety of allowing the agency to make a record de novo before the reviewing court where the existing record is so deficient as to be unreviewable. Both briefs quote Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244 (1973), to

This court-generated record is specifically cited and relied on in the Second Circuit's reversal. The Second Circuit's opinion, which holds in favor of plaintiffs, rests in part on the persuasiveness of the record made by plaintiffs through the testimony received in court. NRDC v. Callaway, supra at 85. In Callaway, this Court explicitly compared plaintiffs' court-generated record on the factual bases with the record made by the Navy and found the latter "sketchy" and inadequate under NEPA standards of full consideration and meaningful analysis of alternatives. Id. at 83-85, 91, 93.

*Gulf Oil Corp. v. Morton, 493 F.2d 141, 143 (9th Cir. 1973) (merely quotes Overton Park); National Helium Corp. v. Morton, 485 F.2d 995, 998 (10th Cir. 1973) (remarks only that the review below was properly not a "trial de novo"); Conservation Council v. Froehlke, 6 ERC 1063, 1064 (4th Cir. 1973) (restates the Overton Park limitations on de novo review as reiterated by the Supreme Court in Camp v. Pitts, 93 S.Ct. 1241, 1243-44 (1973); Consolo v. FMC, 383 U.S. 607, 619 n.17, 86 S.Ct. 1018, 1026 n.17 (1966) (anticipates Overton Park in noting the limited provision for de novo review under the APA). These are the only cases cited by defendants on the subject of de novo review.

the effect that a reviewing court should focus on the existing administrative record rather than " ... some new record made initially in the reviewing court." (Federal Brief, 45; NOIA Brief, 55.) But the single narrow, expressly-stated issue in Camp v. Pitts concerned:

" ... the proper procedure to be followed when a reviewing court determines that an administrative agency's stated justification for informal action does not provide an adequate basis for judicial review." Id. at 138, 93 S.Ct. at 1242.

That, of course, is not an issue in the present case. Camp v. Pitts held that, where it was the issue, the reviewing court should remand to the agency rather than have the agency create a reviewable record before the court. Since this issue did not arise in the present case, the Camp v. Pitts restriction on "a new record made initially in the reviewing court" has no application here whatsoever.

NOIA's Brief, 44, cites three additional cases in support of the irrelevant quotation from Camp v. Pitts. Since they, too, are irrelevant to the present case, and for the same reasons, there is no need to discuss them in detail.*

*Federal defendants' lengthy footnote, Federal Brief, 45 n.11, is correspondingly irrelevant. Neither Overton Park nor Camp v. Pitts provides an iota of authority for the proposition that a reviewing court should not "go beyond the existing record" in cases where the existing administrative record is reviewable and where plaintiffs challenge the adequacy (because of inaccuracies) of the agency

Federal defendants' citation, to Dunlop v. Backowski, 421 U.S. 560 (1975) is thoroughly misleading.* Contrary to Dunlop, the landmark case of Calvert Cliffs' Organizing Committee v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971), cert den., 404 U.S. 942 (1972), has been cited over and over again by courts for the proposition that in enacting NEPA, Congress did not intend that quick resolution of agency decisions excuse full compliance with Sec. 102 of NEPA, which the Courts have a recognized responsibility to enforce.

Plaintiff submits, therefore, that the propriety of the

record, Hooker Chemicals & Plastics Corp. v. Train, 537 F.2d 620 (2d Cir. 1976), cited in that same rambling footnote, also has no relevance to the present case. Hooker Chemicals was brought under the FWPCA amendments of 1972, not NEPA. In Hooker, this Court reviewed, vacated, and remanded EPA effluent guidelines holding that EPA had failed to consider all relevant factors. The Court found the record reviewable, but the decision arbitrary because the Court could not "trace" the agency's reasoning. Federal appellants argue that because the record here does not present that defect the District Court improperly entertained and considered new evidence. But the deficiency alleged by plaintiffs herein was altogether different and the Court below could not have performed its reviewing function without hearing plaintiffs' evidence challenging the adequacy of the Sale 40 factual bases.

*Dunlop arose not under NEPA but under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The Supreme Court held in Dunlop that although it was not the intention of Congress to exempt decisions of the Secretary of Labor from review under the LMRDA, nonetheless an intention to limit the scope of review must be inferred from statutory objectives: The objectives included prompt settlement of disputed elections of union officials. Based on this finding of special congressional intent, the Court concluded that review of the Secretary of Labor's decisions under the LMRDA may not extend to "challenges to the factual bases for the Secretary's conclusion." Dunlop v. Backowski, supra at 576-77, 95 S.Ct at 1860. No court has ever found a comparable intent of Congress to limit judicial review in cases brought under NEPA.

District Court's review has not been seriously contested.

The rationale for the District Court's NEPA review of Sale 40 EIS is clearly articulated in National Helium Corp. v. Morton, 361 F.Supp. 78, 95 (D. Kan. 1973), rev'd. on other grounds, 486 F.2d 995:

"In this case the plaintiffs have proffered numerous documents and reports which were either prepared by the Department of Interior itself or other federal agencies, or readily available to any member of the public bearing directly upon the environmental impact of the Secretary's action. The defendants' pat response is that the documents were not brought to their attention by the plaintiffs prior to the preparation of the final environmental statement or the Secretary's decision so they are not relevant. The fallacy inherent in this reasoning is that it assumes that it is the burden of others outside the agency to bring pertinent material to the attention of the agency — it is not. The duty to unearth and utilize all relevant and available information lies directly and unequivocally with the agency.

"In reviewing agency compliance with NEPA, the Court is obliged to consider all relevant material bearing directly or indirectly on the environmental aspects of the action under consideration which were either (1) in the agency's files, but not disclosed in the final environmental statement: or (2) readily available to the agency had it fulfilled its statutory responsibilities. Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission, supra, 449 F.2d at p. 1119."

E. Failure to Consider the Impact of
Leasing Alternative Tracts

The District Court found that those responsible for the selection of tracts to be leased failed to adequately examine the potential environmental effect of offering, and accepting bids, on tracts other than those actually proposed and leased:

It is clear from the record that nowhere in the lengthy process of considering which tracts were ultimately to be leased did the Secretary or the Bureau of Land Management personnel charged with preparing NEPA documents consider the onshore impact of choosing particular tracts, rather than others. (Dec. 72; JA 95).

The District Court was correct in reaching this conclusion based on the evidence presented, i.e. the Sale 40 EIS and the testimony of Ms. Gresham.

The Sale 40 EIS does not contain an analysis of the effects that the leasing of different tracts would have on pipeline routes, onshore impacts or local zoning and related powers. As the District Court pointed out, such an analysis might have led to the choosing of tracts more contiguous with potentially acceptable pipeline landfalls, thus decreasing pipeline lengths and the risk of tankers and the adverse environmental impacts of the lease sale. (Dec. 73; JA 96). The Sale 40 EIS discussion of leasing alternative tracts contains no such analysis.

In addition to the inadequacy of the EIS on this point, further evidence established that neither the Secretary nor his agents, in deciding which tracts to actually lease, took into consideration likely pipeline routes which would result, the onshore impacts or the relationship location of the chosen tracts might have to local law or practice. (JA 96). Indeed, such considerations could not have been taken into account since nowhere in the NEPA documents was such an analysis made.

The District Court correctly concluded that such an analysis should be undertaken. The failure to address the impacts that leasing of those tracts selected would have as compared with others means that important alternatives, within the basic scope of the proposed action, but with less adverse environmental impacts were never considered.

This court in NRDC v. Callaway, supra at 92-93 stated that consideration of the relative merits and demerits of the proposed action and possible consequences is the most essential part of the NEPA process. The Council on Environmental Quality Guidelines, 40 CFR §1500.8(a)(4), also point up the importance of such consideration.

"A rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions, particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects, is essential. Sufficient analysis of such alternatives and their environmental benefits, costs and risks should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might enhance environmental quality or have less detrimental effects."

Defendants attempt to twist the District Court's conclusions. They argue that the Court is effectively requiring that the EIS be prepared at the very beginning of the tract selection process. After misconstruing the Court's holding in this regard, they strike down the misconstruction. Defendants cite Aberdeen and Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975) ("SCRAP II") for the proposition that the EIS need not come at such an early stage.

But this is not at all what the District Court was requiring. Judge Weinstein's point was that "nowhere" in the lengthy process of considering which tracts would be leased, including the Sale 40 EIS, was there an analysis or consideration given to this issue. At no point did the District Court state that such an analysis or consideration must occur from the very beginning of the decisionmaking process. The Court's point was simply that such analysis and consideration must precede the final decision by the Secretary on which tracts to lease.

F. The Failure to Evaluate Separation of
Exploration and Production Leasing

The District Court found that the Sale 40 NEPA materials and the record developed at trial establish that the Bureau of Land Management and the Secretary failed to adequately consider the alternative of separating exploration and development, despite the fact that responsible and reiterated public comments urged consideration of this alternative. (Dec. 60; JA 83).^{*/} The District Court concluded that the failure to treat such a reasonable alternative clearly violated NEPA.

The District Court's analysis of the Sale 40 EIS, the DEIS and the testimony of the government's witness Ms. Gresham reveals the devastating factual basis on which its finding is based. (Dec. 60-63; JA 83-86). We need not repeat that discussion.

The District Court has also set forth the NEPA law on alternatives and this does not need to be amplified. We believe the District Court was correct in its interpretation of the law and in the application of the law to the facts.

^{*/}No less than thirteen commentators urged consideration of separation of exploration and development. 3 EIS 67. The federal government's peremptory response was that such separation is not authorized under the OCS Lands Act. *Id.* Even this statement is not entirely true since government-sponsored exploration, followed by leasing rights to private companies, may be carried out under existing law.

Federal defendants argue that there had been extensive review within the Department of Interior of the alternative of separating leasing the rights to explore and those to develop and produce. But the documents cited are internal memoranda which were not part of the NEPA documents nor circulated for public comment and review. The existence of such documents, therefore, does nothing to satisfy the deficiencies in the NEPA process itself.

Defendants argue that Sierra Club v. Morton, supra, sanctions the omission of any discussion of the separation alternative. That decision, however, failed to recognize an essential fact: that separation of exploration from the development and production phases would allow the government at all levels to exercise timely and essential controls over environmental impacts, especially those associated with onshore impacts. Numerous commentators noted this in their requests to the Secretary to consider this alternative.

The additional environmental benefits flowing from such separation are that the Secretary can make an informed decision on whether or not to permit development and production, based on information on the biological and hydrocarbon resources collected during the exploration phase. For example, if it appears that the biological resources are valuable and extremely vulnerable to oil pollution and the oil and gas resources very limited, he may decide not to lease an area for development and production. Under the present system, the leasing of development and production rights

occurs before the Secretary has such information and, therefore, he is not in a position to make such an informed decision. And, of course, once he has leased an area, he may not subsequently terminate the lease because of the threat of serious environmental harm.

Because of the importance from an environmental viewpoint of the separation alternative, the Court was correct in concluding that the Secretary's failure to adequately consider this alternative constituted a violation of NEPA.

G. The Secretary's Lack of Good Faith
Consideration

Notwithstanding what it termed "strong circumstantial evidence," the District Court declined to decide whether the decision to proceed with Sale 40 was made without considering the NEPA documents. (Dec. 82; JA 105.)

Given the extensive circumstantial evidence to which the District Court referred, some of which is set forth in specific detail in the final decision (Dec. 75-82; JA 98-105), even if the NEPA documents had been perfect, there was ample justification for a conclusion that the leasing decision had been made previous to the completion of the EIS, and that the NEPA process was a "charade."

Plaintiff NRDC limits itself here to pointing out that "bad faith," that is, deciding to proceed without considering the NEPA documents, is a violation of the National Environmental Policy Act.

§102 of NEPA requires that federal agencies "give full consideration to environmental impact as part of their decision-making process." Calvert Cliff's Organizing Committee v. AEC, 449 F.2d 1109, 1112 n.5 (D.C. Cir. 1971):

"Perhaps the greatest importance of NEPA is to require the Atomic Energy Commission and other agencies to consider environmental issues just as they consider other matters within their mandates. This compulsion is most plainly stated in Section 102." Id. at 1112 (original emphasis).

The same court noted that Congress set a high standard for agency compliance with NEPA and that the failure of a responsible federal official to carry out "to the fullest extent possible" any of the procedural requirements of §102 - including that of "full consideration" - calls for enforcement by a reviewing court. Thus, if the agency's:

"decision was reached procedurally without individualized consideration and balancing of environmental factors conducted fully and in good faith - it is the responsibility of the courts to reverse." Id. at 1115 (emphasis added).

The Second Circuit has repeatedly reaffirmed this interpretation of NEPA, indicating that an agency decision must not be made until after a complete and adequate impact statement has been considered.

"Otherwise, the process becomes a useless ritual, defeating the purpose of NEPA, and rather, making a mockery of it." NRDC v. Callaway, 524 F.2d 79, 92 (2d Cir. 1975).

See also Chelsea Neighborhood Ass'ns. v. U. S. Postal Service 516 F.2d 378, 387-88 (2d Cir. 1975).

Thus, if an adequate EIS is prepared but consideration is not given to that EIS in the agency decision-making process, then the agency has violated NEPA.

II.

THE INJUNCTIVE AND DECLARATORY RELIEF GRANTED BY THE DISTRICT COURT WAS PROPER

The District Court found that the leasing of federal lands in the Sale 40 area for oil and gas exploration, development and production represented an irretreivable and irreversible commitment of resources now, and that this commitment "poses a substantial threat of irreparable injury" which "may profoundly effect the mid-Atlantic region and its human and natural resources for at least the next quarter century." (Dec. 93; JA 116). The District Court also found that this commitment was made in serious and substantial violation of NEPA.

Accordingly, in order to insure compliance with NEPA prior to the time the irretreivable commitment of resources is made, as is required by the Act, The Court enjoined the project and voided the leases that the Secretary had granted.

The District Court was correct as to both parts of the relief granted. Numerous cases have enjoined projects to insure full compliance with the strong Congressional policies set forth in the Act.^{*/} Moreover, many cases have voided federal permits

^{*/}These cases were cited in the District Court's opinion at 90-91 (JA 113-114).

or licenses for the purpose of assuring adequate consideration of environmental factors. Scenic Hudson Preservation Conference v. FPC 354 F.2d 608 (2d cir. 1965), cert. denied, 407 U.S. 926 (1972) (license for hydroelectric project set aside); Citizens Committee for Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), aff'd. 425 F.2d 97 (2d Cir. 1970) (Corps of Engineers filling permit along edge of the Hudson River for a highway voided); Citizens for Clean Air v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972) (Corps of Engineers permit for putting waste into East River in connection with power plant voided.)

In making its decision, the Court took evidence on the equities and after weighing them, properly concluded that they required the issuance of an injunction (Dec. 92; JA 115). As discussed in the statement of facts (pp. 30-33 supra), the evidence supports the finding that there is a "substantial threat of irreparable injury" from the leasing, and that the impact of overlooked or unrealistically assessed hazards could be "permanent and devastating." (Dec. 93; JA 116).

The evidence presented by defendants as also discussed above (pp. 30-33, supra) shows that the harm to private industry is small compared to the harm to public interest that stems from doing the project without compliance with NEPA. Nor does requiring NEPA compliance interfere with the public's interest in energy supplies. The Sale 40 resource cannot, in any event, be brought ashore before three years elapse, so that a short

delay now to obtain NEPA compliance does not loom large, especially in view of a 25-year production schedule; moreover, the Sale 40 resource is estimated at maximum to be less than a 6-month supply of the nation's oil consumption.

The Court was also correct in not granting the lesser remedy of enjoining development pending completion of an adequate EIS, but permitting the leases to stand. The Court recognized that many basic decisions which affect the environment are made at the time of leasing, and that unless the leases are voided, the Secretary is locked into them and is subsequently unable to change them even if a subsequent EIS should point to the need for such alteration. ^{*/}

Defendants citation of State of New York v. NRC, ____ F. 2d ____ (2d Cir., Feb. 14, 1977) for the concept that an injunction may not issue for any NEPA violation absent showing "immediate, demonstrable and irreparable" injury is incorrect and inapposite. First, New York v. NRC concerned the standard for issuance of a preliminary injunction. Second, contrary to that case where the District Court found the prospect of injury remote, in this case the District Court found specifically that "an irreversible commitment of resources is now being made, and it poses a substantial threat of irreparable injury." (Dec. 93: JA 116) (emphasis supplied).

*/These basic leasing decisions include: areas of Federal land to be leased; lease terms; tying together of exploration development and production rights; and establishment of regulations, the violation of which would entitle the Secretary to cancel the leases.

Defendants also attempt to make the bootstrap argument that because the sale was allowed to proceed, the District Court may not now, after full trial, void the leases.

This argument is fallacious.

First, this Court and the Supreme Court expressly warned that the possibility existed that the leases could be invalidated. Second, the standard for a preliminary injunction is different from the standard for the permanent injunction. To obtain the preliminary injunction, plaintiffs had to show that they would suffer irreparable harm between the time of the application and the completion of the trial on the merits. This Court held that the "sale, in and of itself" would not produce that effect. To obtain the permanent injunction, plaintiffs needed to show the potential of a substantial threat of irreparable injury, and the Court below found that they did.^{*/}

Nothing in the OCS Lands Act, 43 USC §1331 et seq., prevents

^{*/}In a footnote, NOIA argues that the Court's decision is in error because lessees are indispensable parties. Even if the defense of failure to join an indispensable party, (which was never the subject of a motion before or during trial) was ever available to defendants, it is no longer available to them. Mastercrafters Clock and Radio Co. v. Vacheron & Constantin - Le Coultre Watches, Inc., 221 F. 2d 464 (2nd Cir., 1955) (defense was waived by failure to assert defense); Nat'l Bd of YWCA v. YWCA of Charleston, 335 F. Supp. 615 (DSC 1971); Wright & Miller, Fed. Prac. and Proc. §1609, p. 85. Furthermore, since the motion was never made, it was never determined whether such parties would be merely proper, necessary or indispensable. The burden to do this is on defendants, Kalmich v. Bruno, 404 F. Supp. 57 (C.D. Ill., 1975).

Adequate notice of the pendency of the suit was afforded to

invalidation of the leases.

The OCS Lands Act, like every other federal statute, is to be read together with NEPA.^{*/} Sections 102(1) and 103 of NEPA require that the policies, regulations and laws of all

all interested parties, who manifestly were content to allow the defendant-intervenors to speak for them in the litigation. They cannot now hope to upset an adverse decision by arguing that the decision involved interests which were not represented at bar. Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 US 102

In fact, the suit was brought and issued had been joined long before any of the parties now claiming an interest had any conceivable "interest" in the outcome. Since it was the invalid sale of leases by the federal defendant - a sale vigorously opposed by plaintiffs - which created any "interests" which might now exist, it would be manifestly unfair and against "good conscience" Provident Tradesmens Bank, supra, to allow defendant's unlawful conduct to deprive plaintiffs of the judgment obtained.

Any 'interest' which defendants now allege the absent parties might possess is not in any case an interest threatened by this judgment. The money deposited into Treasury can be refunded. This money does not represent payments which, as intervenors allege, the bidders had "no choice" (Intervenors Brief, p.67) but to pay. They were under no compulsion to participate in a bid which they knew might subsequently be invalidated; the fact of the matter is, of course, that they themselves through the intervenors, sought to assure that the lease sale would go forward.

The contingent "commitments" which might have been entered into (Intervenors Brief, p. 67-8) provide no basis for invocation of Rule 12(b), since such third party contracts as might have been entered into are not at issue. American Brake Shoe and Foundry Co. v. IRT Co., 10 F. Supp. 512 (SDNY 1935), aff., 76 F.2d 1002, cert den. 295 US 760; Midland Nat'l Bank v. Cousins Properties, Inc., 68 FRD 427 (ND Ga., 1975); Moore, Federal Practice, ¶19.10, p. 2349.

^{*/}See Union Oil v. Morton, supra.

governmental agencies must be interpreted and administered in accordance with NEPA. Indeed, the Secretary never contended here that NEPA responsibilities do not apply to him in his implementation of the OCS Lands Act. As the cases discussed above (p. 84) demonstrate, where an agency violates NEPA in implementing its organic act, that implementation may be set aside as the only effective way to insure full compliance with NEPA.^{*/}

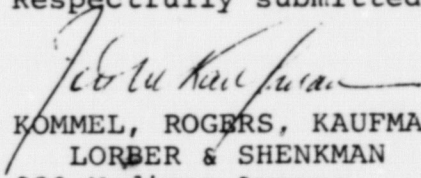
Nor do either Union Oil v. Morton, supra or Gulf Oil v. Morton, 493 F.2d 141, (9th Cir. 1973) prevent the remedy granted by the District Court. Both of these cases dealt with subsequent attempts to cancel or indefinitely suspend leases that were validly issued. It is precisely because of the holding of these cases--that validly issued leases vest rights in lessees--that it is necessary to void leases here issued invalidly. The sooner this is done, the less harm to all parties. Thus, in this case which Justice Marshall so aptly characterized as "fact-intensive," the District Court's findings of NEPA violations and the remedy it applied to preserve the public's paramount interest in insuring that the project not go forward until the environmental impacts have been detailed and considered are proper and correct.

^{*/}Biderman v. Morton, 497 F. 2d 1141, 1147 (2nd Cir. 1974) cited by NOIA, specifically provides that where non-federal action cannot lawfully begin without Federal approval, it is beyond cavil that the Court may enjoin the non-federal actions pending completion on an EIS.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed in all respects.

Respectfully submitted,


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April 8, 1977

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-6049

SECRETARY OF THE INTERIOR, et al
Appellants

v.

COUNTY OF SUFFOLK, et al
Appellees

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street Flushing, N.Y.

That on the 15th day of April, 1977, deponent served the within Brief of Appellee, Natural Resources Defense Council, Inc. upon See Attached List

See Attached List
Attorney(s) for the in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Stephen Zedalis

This 15th day of April 1977

Edward A. Quimby

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